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Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients

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I. INTRODUCTION

Practicing law means working with people. To be effective in working with clients, witnesses, judges, mediators, arbitrators, experts, jurors, and other lawyers, attorneys must have a good understanding of how people think and make decisions, and must possess good people skills.¹ Yet, law schools

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¹ An ongoing study by law professor Marjorie Shultz and psychology professor Sheldon Zedeck has identified twenty-six factors that contribute to lawyers' effectiveness. Many of these factors draw from psychological insights. The twenty-six factors are: analysis and reasoning, creativity/innovation, practical judgment, researching the law, passion and engagement, questioning and interviewing, influencing and advocating, writing, speaking, integrity/honesty, ability to see the world through the eyes of others, self-development, organizing and managing others, negotiation skills, networking and business development, building client relationship including advice and counsel, organizing and managing own work, developing relationships, evaluation/development/mentoring, problem solving, stress management, fact finding, diligence, listening, community involvement and service, and strategic planning. University of California, Berkeley School of Law, 26 Effectiveness Factors, <http://www.law.berkeley.edu/beyondlsat/effectiveness.pdf> (last visited Feb. 8, 2008). The ultimate purpose of this study, supported by the Law School Admission Council, is to

have tended to teach very little, directly, about how to be good with people, and current critiques of legal education do not focus much on the importance of psychological insights to attorneys.²

At the same time, the insight that the practice of law is far more people-oriented than is legal education is not new. In 1955, then Harvard Law School Dean Erwin Griswold gave a speech entitled "Law Schools and Human Relations." He wrote:

There is some tendency, with the case method, for the study of law to be something like the study of chess or the analysis of a bridge hand. When analyzing the law in intricate detail, it may be hard to keep in mind the vital fact that the problems really relate to people, either the people who are parties to the case, or the people who will be affected by the law established once the case is decided.³

Responding in part to the comments of Dean Griswold and others, as well as to documents such as the MacCrate Report,⁴ law schools now offer far more people-oriented courses than they did in the 1950s. Specifically, law schools now often sponsor clinics that involve direct client contact and skills courses such as trial practice, interviewing and counseling, negotiation, and

design a law school entry exam that can predict success as a lawyer, and not just as a law student. See University of California, Berkeley School of Law, Law School Admission Project: Looking Beyond the LSAT, <http://www.law.berkeley.edu/beyondlsat/> (last visited Feb. 8, 2008) (containing articles discussing study). See also Stephen Feldman & Kent Wilson, *The Value of Interpersonal Skills in Lawyering*, 5 LAW & HUM. BEHAV. 311, 320 (1981) (reporting study showing that clients' perceptions of attorneys are most favorable when the attorneys have both technical competence and good people skills).

² See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION *passim* (2007) (recognizing that lawyers need to possess communication and problem-solving skills but failing to place much emphasis on psychological aspects of lawyering).

³ Erwin N. Griswold, *Law Schools and Human Relations*, 37 CHI. B. REC. 199, 201 (1956).

⁴ The MacCrate Report urged that law schools place more emphasis on teaching a broad array of skills, and not merely focus on legal analysis. A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 330 (1992). This Report received substantial attention, and has sparked follow-up symposia. See, e.g., Symposium, *The MacCrate Report: 10 Years After*, 23 PACE L. REV. 513 (2003). See also WILLIAM M. SULLIVAN ET AL., *Summary of the Findings and Recommendations*, in EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 6 (2006), available at http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers_summary.pdf (noting that law schools offer clinics and skills courses but urging that law schools typically "give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice").

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mediation, as well as some doctrinal courses that incorporate various psychological insights.⁵

Nonetheless, lawyers and legal education have still not taken full advantage of the great strides that have been made in the field of scientific psychology in recent decades.⁶ Psychologists know much and are learning more about how people think, remember, and decide, but law schools have not broadly integrated these insights into the law school curriculum.⁷ Some courses do draw on psychological science but still fail to take note of many of the insights that psychology can offer.⁸

Similarly, psychologists are not doing as much as they might to apply their discipline to all aspects of law. While law and psychology texts and

⁵ SULLIVAN ET AL., *supra* note 4, at 7 (observing that while law schools offer more experiential and contextual courses than they did fifty years ago, such courses are still often placed in a subordinate status). One professor urges that interpersonal skills are so important to lawyering that they should be taught directly. See Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1283 (2004).

⁶ E.g., Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 43 (1991) (noting that law students learn little about encountering people in stressful situations and fashioning solutions that are responsive to human as well as legal concerns).

⁷ Psychology is not the only relevant social science. Lawyers can also learn a lot from the fields of communications, sociology, economics, and many others. But to us, psychology seems particularly relevant and, at a minimum, psychology offers enough insights to fill an article.

⁸ For example, a number of excellent books have been written to teach the skills of interviewing and counseling clients. Yet these books do not cover psychology in the detail we think would be useful. See ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING & NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990) (drawing extensively from psychoanalysis and psychotherapy but failing to consider various other psychological insights); DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004) (offering practical suggestions, some based on psychological insights, but failing to provide detail regarding background psychology); ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* (1999) (including some psychology, such as a section on information processing flaws); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 59–107 (2d ed. 2003) (devoting a relatively small portion of the book to interviewing and counseling, and within those pages focusing only briefly on psychology); THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (3d ed. 1997) (drawing on literature from counseling, psychoanalysis, and other sources to provide practical suggestions on interviewing and counseling, but failing to cover other links between psychology and interviewing and counseling).

courses are now commonly offered for undergraduate and graduate students in psychology as well as for law students, these almost always focus exclusively on a few limited aspects of law and legal practice. The typical law and psychology course or book tends to cover primarily criminal rather than civil law and practice, and places its emphasis on the psychology of juries, eyewitness testimony, interrogation, and trials.⁹

This Article begins to fill some of the gaps that exist in the application of psychology to law, focusing on important lessons practicing civil attorneys can learn from psychologists. In particular, this Article will look at psychological insights that are important to the endeavor of interviewing and providing initial counseling¹⁰ to clients¹¹ in civil cases.¹² Law students

⁹ *E.g.*, CURT R. BARTOL & ANNE M. BARTOL, *PSYCHOLOGY AND LAW: THEORY, RESEARCH, AND APPLICATION* (3d ed. 2004) (offering text focused, inter alia, on juries, evidence, eyewitness testimony, and corrections); *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* (Neil Brewer & Kipling D. Williams eds., 2005) (offering detailed and technical insights focused on psychology of the criminal justice system); MARK COSTANZO, *PSYCHOLOGY APPLIED TO LAW* (2004) (discussing psychology as applied to criminal and workplace contexts); ANDREAS KAPARDIS, *PSYCHOLOGY AND LAW: A CRITICAL INTRODUCTION* (2d ed. 2003) (addressing interface between psychology and criminal law). *But cf.* JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* (6th ed. 2006) (covering a broader range of topics). While it is understandable that such texts focus on the applications of psychology that have been the most thoroughly researched in the legal context—see Richard L. Wiener et al., *Evaluating Published Research in Psychology and Law: A Gatekeeper Analysis of Law and Human Behavior*, in *TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY* 371, 378–81 (James R.P. Ogloff ed., 2002)—we argue both that there is a wide range of psychological theory that remains untapped and that there are a whole host of legal areas for which the insights of psychology have not been carefully explored.

¹⁰ Given the large percentage of time attorneys spend interviewing and counseling clients, this is a very important skill for attorneys to possess. *E.g.*, David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72, 91 (1983) (concluding that lawyers spent 16% of their time conferring with clients, and spent significantly less time either conducting research or participating in trials or hearings); Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 *LAW & CONTEMP. PROBS.*, Summer/Autumn 1995, at 5, 8.

¹¹ We focus on individual rather than organizational clients. We believe that our insights are relevant to organizational clients as well, but also recognize that additional group psychology would be useful to assist attorneys in representing organizational clients.

¹² Many of the insights that we develop here are also relevant to the handling of criminal cases. We have chosen to focus on civil rather than criminal cases simply based on our collective expertise and because we need to place some limits on this already unwieldy topic. See Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 *CLINICAL L. REV.* 783, 785–86 (2003) (applying

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commonly graduate from law school understanding little if anything about perception, memory, communication, cognitive heuristics, or decisionmaking.¹³ While good lawyers ultimately pick up some of this information through experience, there is no reason to leave new lawyers to flounder based on a lack of understanding of these psychological principles.¹⁴ Further, even experienced lawyers can benefit from more

psychological insights to the interview of a criminal defendant).

¹³ There is an empirical question about the extent to which this psychological material can be effectively taught in the classroom, or whether such insights are best learned on the job. Research indicates that relevant strategies are teachable. *See, e.g.,* Geoffrey T. Fong et al., *The Effects of Statistical Training on Thinking about Everyday Problems*, 18 COGNITIVE PSYCHOL. 253, 280–82 (1986); Richard P. Larrick et al., *Teaching the Use of Cost-Benefit Reasoning in Everyday Life*, 1 PSYCHOL. SCI. 362, 369 (1990); Darrin R. Lehman & Richard E. Nisbett, *A Longitudinal Study of the Effects of Undergraduate Training on Reasoning*, 26 DEVELOPMENTAL PSYCHOL. 952, 959 (1990); Richard E. Nisbett et al., *Teaching Reasoning*, 238 SCI. 625, 631 (1987). Certainly, medical schools have operated under the assumption that communication skills and improved bedside manner can be taught, as the majority of schools are now including such courses in their curriculum. *See, e.g.,* Dennis H. Novack et al., *Medical Interviewing and Interpersonal Skills Teaching in US Medical Schools: Progress, Problems, and Promise*, 269 JAMA 2101, 2101–02 (1993). An analysis of these medical school training programs has shown them to be effective. Knut Aspegren, *BEME Guide No. 2: Teaching and Learning Communication Skills in Medicine—A Review with Quality Grading of Articles*, 21 MED. TEACHER 563, 566 (1999). Given that learning on the job will necessarily be inefficient, in that lawyers who seek to learn by doing will inevitably suffer from confirmatory bias, illusory correlations, constructed realities, and other phenomena discussed in this Article, it seems worthwhile to attempt to teach some of the relevant psychology in the classroom. However, as studies in the medical field seem to show that experiential teaching of these matters yields far better results than instructional teaching, thought will need to be given to how to best convey the kinds of material covered in this Article. *See id.* at 565.

¹⁴ We recognize that the psychological makeup of many lawyers may present challenges to the mastery of some interviewing and counseling skills. A number of studies and articles emphasize that many lawyers are more comfortable with analysis and rules than they are in confronting emotion. *See, e.g.,* Nancy A. Welsh, *Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically*, J. DISP. RESOL. (forthcoming 2008) (urging that we must encourage lawyers and law students to feel more human connections); Marjorie A. Silver, *Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999) (urging that lawyers improve their emotional intelligence); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997) (examining why lawyers so persistently define problems in narrow analytical fashion); Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 341, 380 (2006) ("[I]t is more difficult for attorneys—who tend to be

explicit study of psychology. While the best lawyers may have intuited some of what will be discussed here, some of the findings are counterintuitive, and even experienced lawyers can improve their approach to interviewing and counseling by drawing on relevant psychology.¹⁵

In general, interviewing and counseling sessions have three main components. First, the attorney uses an interview to obtain information from the client. Second, the attorney uses the counseling portion of the initial session to provide information to the client. Third, throughout the session the attorney is concerned with establishing rapport between attorney and client. Success or failure in building rapport with the client will inevitably affect the attorney's ability to obtain and provide information, and to ethically and effectively counsel the client in this and future sessions.

Knowledge of the psychology of both client and attorney is highly relevant to all three facets of interviewing and counseling and is critically important as attorneys seek to build good rapport, obtain relevant information from clients, retain that information, and guide clients regarding their options. Thus, attorneys who read this Article should gain insights about themselves, as well as about their clients. Interestingly, the former may prove more challenging to apply than the latter. Studies have shown that people display an asymmetry in their responses to learning about some of the psychological phenomena described in this Article—demonstrating a tendency to believe that such phenomena occur in others, but not in themselves.¹⁶

rational, logical and analytical—to be sensitive to parties' interpersonal, emotional or extra-legal needs."); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–48 (1982) (contrasting lawyers' traditional legal and monetary focus with the more holistic focus of mediation). Nonetheless, we are hopeful that many of the psychological insights we provide will be of use even to the most analytically-inclined attorneys.

¹⁵ Our goal is to provide lawyers, law students, and law professors with enough information about relevant psychology that they can go beyond our suggestions in determining how to apply the psychology to interviewing and counseling. That is, rather than provide an interviewing and counseling checklist or cookbook, we believe it is important to provide our readers with enough raw ingredients that they can make their own stew. The insights that can be drawn from the psychology we present here are infinite, and the proper approach will vary substantially with context-specific differences in clients and circumstances. Thus, whereas any checklist or set of instructions would inevitably be deficient, we hope that psychologically-educated attorneys can find additional applications. Moreover, we recognize that attorneys must balance many factors in designing their interviews. Even an attorney who is knowledgeable about psychology might find that financial or other constraints preclude her from following all of our suggestions, which is another reason we opt to provide background rather than checklists.

¹⁶ See, e.g., Joyce Ehrlinger et al., *Peering Into the Bias Blind Spot: People's*

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The remainder of this Article will be organized as follows. First, in Part II, we will introduce a lawyer, Jack, whom we think would benefit from reading this Article. We will describe how Jack thinks about interviewing and counseling and provide a few examples of interviewing and counseling sessions he will soon conduct. Although Jack is not based on any single person, we suspect that many readers will recognize aspects of Jack in themselves or in students or lawyers whom they know. Part III will provide a review of some relevant psychology. Of course we will not cover all aspects of psychology or even all the nuances of the areas we review, but instead will focus on research we see as most pertinent to interviewing and counseling clients. As we discuss each topic we will provide a few applications, making suggestions for how Jack might interview and counsel his clients. Finally, in Part IV, we will offer a summary of some of the key insights psychology provides with respect to legal interviewing and counseling sessions.¹⁷

II. A TRADITIONAL APPROACH TO INTERVIEWING AND COUNSELING

Jack is a lawyer whom we think might benefit from reading this Article. Jack is very bright. He got high scores on his LSAT, and he did well in law school. Not surprisingly, therefore, Jack is a whiz when it comes to legal research and analysis. Give him the facts and the legal question and he can recite or find the relevant statutes and cases. He writes well and also speaks very clearly. He can assess the legal risks of situations well. Jack is also a nice guy, truly interested in doing the best work he can on behalf of his clients. While it may be easiest to envision Jack as a recent law school graduate, no doubt more than a few Jacks have practiced law for many years

Assessments of Bias in Themselves and Others, 31 PERSONALITY & SOC. PSYCHOL. BULL. 680, 689 (2005); Cynthia McPherson Frantz, *I Am Being Fair: The Bias Blind Spot as a Stumbling Block to Seeing Both Sides*, 28 BASIC & APPLIED SOC. PSYCHOL. 157, 166 (2006); Joachim Krueger, *Enhancement Bias in Descriptions of Self and Others*, 24 J. PERSONALITY & SOC. PSYCHOL. 505, 505 (1998); Justin Kruger & Thomas Gilovich, "Naïve Cynicism" in *Everyday Theories of Responsibility Assessment: On Biased Assumptions of Bias*, 76 J. PERSONALITY & SOC. PSYCHOL. 743, 751 (1999); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 793 (2004); Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 575 (2007).

¹⁷ As we begin this foray into psychology, one ethical caution is in order. Psychology, like most things, can be used for good or evil. While there is a possibility that lawyers could use the tools here to deceive or gain unfair advantage over other people, it is hoped that the tools discussed here will only be used for just purposes.

and may even be nearing retirement.¹⁸

Let us now follow Jack, as he commences to interview and counsel a client.¹⁹ In terms of logistics, Jack has never given any particular thought to the location of an interview, to the way the room is set up, to whether food or other amenities are provided, or to what he wears. Jack's sense is that all of this is irrelevant to the task at hand: information extraction. He thinks he could get the same information interviewing a client in a McDonald's, a bleak conference room, or a luxury suite.

Jack always asks his secretary or paralegal to get at least a bit of information on the potential case before he meets with the client. When possible he uses intake forms, filled out prior to the interview. Then, if the issue is unfamiliar, Jack does at least some advance research so that he can be prepared to ask clients the most relevant questions and avoid going down blind alleys.

Jack believes that it is best to be somewhat informal with clients. He always shakes his client's hand at the beginning and end of an interview, and he always addresses clients by their first names. He looks them straight in the eye to show that he is sincere. Beyond this, Jack has not given much thought to the idea of developing rapport with his clients. He believes that if he is competent, and provides good legal advice, his clients by and large will like him and bring him new business or refer additional clients. Once Jack is beyond the inevitable preliminaries of the attorney-client privilege and conflicts checks, he gets to the point as quickly as possible.

Jack's overall philosophy is that clients are an important, yet very inefficiently organized, source of information. Jack often envisions himself

¹⁸ Jack is an amalgam, and certainly not based on any particular individual. Yet, lest any readers doubt that Jacks really exist, see, for example, BASTRESS & HARBAUGH, *supra* note 8, at 61–62 (quoting THE NAT'L L.J. 13, 44–45, 47 (Dec. 1, 1980)) (describing a lawyer somewhat like Jack).

¹⁹ We do not assert that Jack's approach is typical. Indeed, few studies have been done regarding how lawyers interview and counsel clients. See Brenda Danet et al., *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 LAW & SOC'Y REV. 905, 917–21 (1980) (discussing why researchers had great difficulty attempting to study a set of civil cases from start to finish). Those few studies that have been done seem to indicate, as one might expect, that lawyers' approaches vary according to the type of practice and type of client. See Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177, 194–98 (1986) (summarizing studies); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115 (1979) (discussing many roles played by Wisconsin consumer lawyers). See also HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* (1990).

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as a detective or law professor, seeking to extract the relevant facts from his client. Jack's frustration is that clients are even worse than the typical law student in stating the relevant facts and he can't understand why so few clients can present information in a coherent fashion. His clients, even those clients with high-powered jobs and advanced degrees, often tell their stories in a jumbled fashion. They fail to effectively organize the information they present either in terms of the relevant law (somewhat understandable) or even chronologically. In addition, a frustrating percentage of clients seem unable to present the right amount of information. They either ramble incessantly or try to keep their information tighter than a high security operation. Don't they understand that their lawyer needs all the relevant information in order to be helpful, and that drowning out the relevant information with irrelevant meanderings only increases the cost of their own representation?

Jack also wonders what is going on with people's memories. Jack's own memory is not perfect when it comes to trivia questions or what he ate for breakfast last Monday, but he certainly thinks he has good recall for the kinds of important events at stake for his clients. Why do so many of his clients say that they can't remember key facts? And, why do they so frequently tell internally inconsistent stories or provide factual information clearly controverted by key documents? Jack doesn't think most of his clients are liars, so is it really that most people are just not very bright? Finally, why are so many of his clients so emotional? Admittedly they are sometimes talking about situations that are personally important and even hurtful, but why can't more of them set aside their emotions long enough to provide the facts in a coherent fashion? Jack knows that his time is money, and to aid himself, his firm, and his clients he prides himself on his ability to extract the relevant facts quickly and efficiently. If Jack could simply attach electrodes to the client's brain, in order to obtain the important information, he would. Unfortunately, as that technology does not yet exist,²⁰ Jack does the best he

²⁰ Scientific advances in neuroscience and neuroimaging techniques such as functional magnetic resonance imaging (fMRI) have captured the popular and legal imagination. See generally MICHAEL S. GAZZANIGA, *THE ETHICAL BRAIN* (2005). See, e.g., Jeffrey Rosen, *The Brain on the Stand*, N.Y. TIMES, Mar. 11, 2007, § 6, at 49; Margaret Talbot, *Duped: Can Brain Scans Uncover Lies?*, NEW YORKER, Jul. 2, 2007, at 52. See also David P. McCabe & Alan D. Castel, *Seeing is Believing: The Effect of Brain Images on Judgments of Scientific Reasoning*, COGNITION (forthcoming 2008) (finding that neuroimages are particularly persuasive). However, it is a leap from current neuroscience to the kind of technology Jack desires. See, e.g., Paul Root Wolpe et al., *Emerging Neurotechnologies for Lie-Detection: Promises and Perils*, 5 AM. J. BIOETHICS, Mar. 2005, at 39.

can.

In terms of questioning technique, Jack does not hesitate to cut clients off when necessary or to use cross examination-style questions. He finds that these methods limit clients' rambling. Once Jack sees the key legal issues he probes his clients' knowledge of the facts that are relevant to support claims or defenses on particular causes of action. He often intersperses feedback on the law with the extraction of information from the client both so that he can impress the client with his knowledge and also so that he can guide the discussion along appropriate lines.

As a counselor, Jack believes in "straight talk." If the client has a loser of a claim or defense, Jack will tell him that. To the extent Jack's clients have multiple options, Jack will give them his opinion regarding which choice is best. In Jack's experience, most clients care most about money, so he will typically help them find the option that is best from the perspective of gaining or saving the most money.²¹ Jack does not believe in wasting time trying to sugarcoat his advice: "lay it out quick and dirty" is his philosophy. He expects his clients to be smart enough to understand what he is saying.

When offering clients advice, Jack is careful to stick to the law. While he recognizes that some clients have emotional or psychological issues, he believes that lawyers should stay as far away from those issues as possible. If a client asks him for a referral to a "shrink," a chiropractor, or a masseuse for that matter, he will provide it if he can. But, Jack certainly does not volunteer such information unsolicited or attempt to counsel clients as to non-legal aspects of their lives or problems. In his view that might almost amount to malpractice, in that he might be seen to be offering suggestions outside his expertise.

Jack is generally quite pleased with his own interview and counseling style. He prides himself on the fact that many of his interviews only last a half hour or so, even in complex cases. Jack believes that he excels in obtaining information quickly from clients, just as he excelled in spotting issues quickly on law school exams. He also believes that he excels in providing guidance that is unbiased. Whether clients' claims are strong or weak, he lays out their chances in an accurate fashion.

Jack works at a medium-size general practice law firm. To give you the sense of his work, we have looked into a crystal ball to determine a few of the interviews Jack will soon conduct:

Edna Employee will come to see Jack because she believes she may have

²¹ Jack's approach is consistent with what some have called a directive style. See, e.g., COCHRAN, JR. ET AL., *supra* note 8, at 111-12.

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been treated illegally at work. Edna is a forty-five-year-old white woman who worked at a major pharmaceutical company for eighteen years. Recently the company conducted a major layoff, and Edna was one of the victims. She believes her termination (with severance benefits) was very unfair, and possibly illegal. The company retained some younger men in her department whom she believes are less qualified and experienced. Indeed, other than a secretary, Edna was the only woman in a ten-person department. Edna believes that her supervisor, Sam Super, was responsible for choosing to terminate her rather than other male employees. Jack will consider a lawsuit for age or gender discrimination.

Carl Cementa owns a company called Carl's Creative Concrete. This company, which has been in existence for twelve years, lays standard concrete for driveways, sidewalks, and foundations. The company also does colorful and creative concrete for backyard patios. The company generally has a very good reputation. Carl will come to see Jack because a former client, Henrietta Homeowner, is threatening a lawsuit. Carl installed a backyard patio for Henrietta that he thought turned out quite well. Now, however, three years later, Henrietta claims that the concrete is cracking and that an improper slope has permitted water to enter her home and cause a mold problem. She has made a nasty phone call to Carl, but has apparently not yet retained an attorney.

Agnes Ageout is seventy-two-year-old widow with three children, three grandchildren, and a fifty-two year-old-boyfriend. Her estate is currently worth approximately \$200,000. She is considering leaving everything to her boyfriend, Lenny Lounger, whom she met about a year ago at a casino in Las Vegas, and she will consult Jack for assistance with estate planning.

Kyle Kiddo is a six-year-old boy who will come to the office with his parents.²² Approximately one year ago Kyle suffered very serious abdominal injuries after accidentally swallowing several magnetic balls. These magnetic balls were part of a play set to be used for constructing interesting shapes. The balls needed to be surgically removed, and surgery

²² Psychologists have done research that would be helpful to Jack in interviewing children. See, e.g., Maggie Bruck & Stephen J. Ceci, *The Suggestibility of Children's Memory*, 50 ANN. REV. PSYCHOL. 419 (1999); STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* (1995); Gail S. Goodman & Annika Melinder, *Child Witness Research and Forensic Interviews of Young Children: A Review*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 1 (2007). Similarly, relevant work has been done with regard to interviewing older adults such as Agnes. See, e.g., Allison M. Wright & Robyn E. Holliday, *Interviewing Cognitively Impaired Older Adults: How Useful is a Cognitive Interview?*, 15 MEMORY 17 (2007). However, this work is outside the scope of this Article.

also had to be done to correct harm caused to some of Kyle's internal organs when the magnetic balls brought them closer together than they should have been. Kyle and his parents are African-American. Jack will consider a products liability suit for defective design and failure to warn against the manufacturer of the magnetic balls.

III. PSYCHOLOGICAL INSIGHTS RELEVANT TO EFFECTIVE INTERVIEWING AND COUNSELING

Jack analogizes his clients to computers or information repositories, and wishes he could simply attach electrodes to elicit the relevant information. However, most readers will not be shocked to learn that people are rather different from computers with respect to how we take in information, how we process that information, how we remember information that we have previously perceived, how we access and convey information that is stored in our brains, and how we think about desired courses of action.

Psychological scientists have studied many aspects of human cognition and behavior that are potentially relevant to interviewing and counseling clients. We focus here on empirical research—primarily from social and cognitive psychology—that has explored how people perceive, interpret, and make judgments about the world around them, how people remember and talk about such information, the influence of culture and notions of justice, and how people use that information to make decisions. Thus, we begin our review by considering the ways in which attention and construal operate to influence our perceptions and the ways in which cognitive heuristics influence judgments about the world. Second, we consider the processes by which people remember and communicate about their experiences, exploring what the science of memory suggests about how to interview clients, whether liars can be reliably identified, and the role of several different aspects of communication in the effective transmission of information between attorney and client. Third, we consider psychological research that finds broad differences among cultures in how people think, resolve disputes, and interact and research on the psychology of justice, both of which have additional implications for lawyer-client interaction. Finally, we explore a range of research findings related to understanding the ways in which people grapple with and make decisions.²³

²³ We do not attempt to review all possible aspects of psychological science that could have implications for client interviewing and counseling. Nor does our focus extend beyond the initial interview and counseling session to include subsequent counseling and negotiation. Additional psychology would be relevant to those aspects of

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A. Perception and Construal

Jack assumes that people observe the world and what happens in it as it is, and can't understand why people have so much trouble describing the facts. However, it is clear from decades of psychological research that "[t]he perceiver . . . is not simply a dutiful clerk who passively registers information. Rather, the perceiver is an active interpreter, one who resolves ambiguities, makes educated guesses about events that cannot be observed directly, and forms inferences about associations and causal relations."²⁴

1. Attention and Interpretation

Our senses are constantly bombarded with an amazing array of information—sounds, sights, physical sensations, odors, and tastes. It would be virtually impossible to pay attention, let alone close attention, to all of the stimuli to which we are exposed. Accordingly, we attend to only a fraction of the possible features of the environment at any given moment.²⁵ Features of both the stimuli themselves (e.g., intensity, suddenness, unexpectedness, or movement) and the perceiver (e.g., expectations) can influence what it is that gets noticed.²⁶

There are a variety of ways in which a person's ability to attend to and

practice. In addition to the categories we have identified above, emotion is an important aspect of human psychology that has implications for interviewing and counseling. We have chosen to weave material on emotion throughout our discussion, incorporating aspects of emotion where they intersect with other aspects of psychology, rather than to include a separate section on emotion. *See infra* Part III.A.4 (discussing anger and causal attribution), Part III.B.5 (describing the affect heuristic), Part III.F.3 (discussing retributive justice), Part III.G.5 (describing affective forecasting), Part III.G.6 (discussing regret). *See generally* Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006).

²⁴ RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 17 (1980).

²⁵ HAROLD E. PASHLER, THE PSYCHOLOGY OF ATTENTION 2 (1998) ("[T]he mind is continually assigning priority to some sensory information over others, and this selection process makes a profound difference for both conscious experience and behavior.").

²⁶ Steven B. Most et al., *What You See is What You Set: Sustained Inattentional Blindness and the Capture of Awareness*, 112 PSYCHOL. REV. 217 (2005). "[I]nstances in which stimuli draw a person's attention without that person's volition" are referred to as "attention capture." *Id.* at 218. *See also* Jochen Triesch et al., *What You See is What You Need*, 3 J. VISION 86 (2003); PASHLER, *supra* note 25, at 242 (describing "involuntary shift of attention").

become aware of stimuli is limited. For instance, psychological research also shows it is difficult to attend to and take in information from multiple sources simultaneously—a problem of divided attention.²⁷ When people attempt to pay attention to multiple things or to engage in multiple tasks, performance suffers.²⁸

Relatedly, people fail to notice even substantial changes in objects (change blindness) or objects themselves (inattentional blindness) when their attention is otherwise engaged.²⁹ In one series of studies, participants were asked to watch two teams of three basketball players and keep track of the players' passes.³⁰ When participants' attention was focused in this way, nearly half failed to notice a person in a gorilla costume or a person with an open umbrella walk through the game.³¹ In another study, people engaged in an actual conversation (asking for directions) that was interrupted (as two people carrying a door passed between them) failed to notice that they were talking to a different person when the conversation resumed.³² Interestingly, people incorrectly predict that they will be able to detect such changes—a phenomenon known as change blindness blindness.³³

²⁷ PASHLER, *supra* note 25, at 101–66.

²⁸ *Id.*

²⁹ See generally ARIEN MACK & IRVIN ROCK, INATTENTIONAL BLINDNESS (1998); Daniel J. Simons & Daniel T. Levin, *Change Blindness*, 1 TRENDS IN COGNITIVE SCI. 261 (1997); Daniel J. Simons & Ronald A. Rensink, *Change Blindness: Past, Present, and Future*, 9 TRENDS IN COGNITIVE SCI. 16 (2005).

³⁰ Daniel J. Simons & Christopher F. Chabris, *Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events*, 28 PERCEPTION 1059, 1062 (1999).

³¹ *Id.* at 1068. Objects can be in the visual field and "still not be 'seen' if they are not specifically being attended." *Id.* at 1070. In other studies, people watching filmed conversations failed to detect changes in the color of the speakers' plates, changes in whether one speaker was wearing a colorful scarf or not, and changes in the actors playing the speakers. Daniel T. Levin & Daniel J. Simons, *Failure to Detect Changes to Attended Objects in Motion Pictures*, 4 PSYCHONOMIC BULL. & REV. 501, 502–03 (1997).

³² Daniel J. Simons & Daniel T. Levin, *Failure to Detect Changes to People in a Real-World Interaction*, 5 PSYCHONOMIC BULL. & REV. 644 (1998). See also Daniel J. Simons, *Current Approaches to Change Blindness*, 7 VISUAL COGNITION 1, 5 (2000).

³³ Daniel T. Levin et al., *Change Blindness Blindness: The Metacognitive Error of Overestimating Change-Detection Ability*, 7 VISUAL COGNITION 397, 401 (2000) (finding that 83% of participants predicted they would detect the changes, compared to the 11%, on average, of participants in previous studies who actually did detect the changes). See also Jeffrey J. Rachlinski, *Misunderstanding Ability, Misallocating Responsibility*, 68 BROOK. L. REV. 1055, 1072 (2003) (discussing how change blindness may cause a driver not to notice a change in his visual field, such as the sudden appearance of a child in the middle of the road and how change blindness blindness may influence a factfinder's

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Thus, to the extent Jack is simultaneously listening to a client's answer to one question, mentally formulating a different question, thinking about the client he saw just before this one, and worrying about what needs to be picked up at the grocery store, he is unlikely to be able perceive all of the relevant information in the client's answer. Moreover, understanding these limits on human attention can help Jack to understand why there are sometime gaps in his clients' knowledge of the relevant facts.

Even once we have attended to and perceived the world around us, our minds interpret the information gathered by our senses.³⁴ In one famous example, students from rival schools watched a tape of a football game between the schools' teams. Students' assessments of the rule violations committed by each team and their overall assessments of the play were influenced by which school they attended.³⁵ Rather than simply recording the violations and the play, observers interpreted the action as they watched it. In a recent study that seems to reflect the same phenomenon, researchers found that NBA referees' foul calls were influenced by the race of the player and the race of the referee.³⁶ In the case of both African-American and Caucasian players, more fouls were called against players by an opposite-race officiating crew.³⁷

Our construal or understanding of events and situations is guided by basic knowledge structures—known as schemas—that define expectations

evaluation of the driver).

³⁴ We also create some of what we see. Mark Snyder, *When Belief Creates Reality*, in 18 *ADVANCES EXPERIMENTAL SOCIAL PSYCHOLOGY* 247 (Leonard Berkowitz ed., 1984) (reviewing studies). See generally ROBERT ROSENTHAL & LENORE JACOBSON, *PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPILS' INTELLECTUAL DEVELOPMENT* (1968) (finding that teachers who expect high performance elicit high performance); Mark Snyder et al., *Social Perception and Interpersonal Behavior: On the Self-Fulfilling Nature of Social Stereotypes*, 35 *J. PERSONALITY & SOC. PSYCHOL.* 656 (1977) (finding that college students who believe they are talking to an attractive person elicit more social responsiveness from that person); Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 *LAW & HUM. BEHAV.* 187, 199 (2003) (finding that interrogators who believed a suspect was guilty elicited more nervous and guilty behavior).

³⁵ Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 *J. ABNORMAL & SOC. PSYCHOL.* 129, 130–32 (1954). See also Emily Balcetis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 *J. PERSONALITY & SOC. PSYCHOL.* 612 (2006).

³⁶ Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees* (Nat'l Bureau of Econ. Research, Working Paper No. 13206, 2007), available at [http://bpp.wharton.upenn.edu/jwolfers/Papers/NBARace\(NBER\).pdf](http://bpp.wharton.upenn.edu/jwolfers/Papers/NBARace(NBER).pdf).

³⁷ *Id.* at 25.

about how the world operates, fill in gaps in information, and facilitate an ability to "make inferences and judgments with heightened ease, speed, and subjective confidence."³⁸ Thus, people have a schema for "baby" or for "lawyer" that provides them with certain expectations and assumptions about how such a creature should look and behave. Or Carl Cementa might have a schema or script for how a typical job is conducted and, therefore, a tendency to assume that Henrietta's patio was similar, that he staffed the job in a typical way, and that he conversed with Henrietta in the way he normally converses with his clients. Such schemas serve us well most of the time, allowing us to process vast amounts of information quickly. In particular, experts, like Jack, may have well-developed schemas that allow them to see patterns that others might not and to use their expertise to select and organize relevant information.³⁹ However, because schemas may not always accurately represent the state of the world in a particular instance, they can sometimes lead us astray.⁴⁰

Social psychologists have shown that "preconceptions can be important to interpreting data and therefore can strongly influence all other tasks that depend on this most basic inferential undertaking."⁴¹ Specifically, preconceptions and expectations can influence how information is labeled and understood, how ambiguous information is interpreted, and the degree to which information is scrutinized. For example, when told that someone is "intelligent," one might understand the person to be "sensible, wise, insightful, and stimulating" if their impression of the person is otherwise positive. On the other hand, the same description ("intelligent") might be understood as describing one who is "cunning and scheming" and "detached"

³⁸ LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 76 (1991). Similarly, people have "scripts" that are schemas for events and that allow an understanding of the typical course of an episode. Robert P. Abelson, *Psychological Status of the Script Concept*, 36 AM. PSYCHOLOGIST 715, 715 (1981). For example, if we hear that a person went to a restaurant, sat down, then realized he had forgotten his reading glasses, we infer that the person had difficulty reading the menu, even though this detail was not explicitly recounted. *Id.*

³⁹ Michelene T.H. Chi, *Two Approaches to the Study of Experts' Characteristics*, in *THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE* 21, 23 (K. Anders Ericsson et al. eds., 2006).

⁴⁰ NISBETT & ROSS, *supra* note 24, at 7 ("[Such] knowledge structures themselves are not infallible guides to the nature of physical or social reality. Some beliefs, theories, and schemas are relatively poor and inaccurate representations of the external world. More dangerous, objects and events are not always labeled accurately and sometimes are processed through entirely inappropriate knowledge structures.").

⁴¹ *Id.* at 67.

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if the person is otherwise perceived negatively.⁴²

Lawyers' schemas may lead them to believe that clients are or should be focused primarily on monetary recovery and on litigation success.⁴³ Yet, if Jack can get beyond these schemas he may realize that for many clients non-monetary issues are highly significant, and that non-legal courses of action can often offer benefits that the courtroom cannot.⁴⁴ Far from constituting malpractice, as Jack tends to believe, considering non-legal issues is part of the ethical practice of law.⁴⁵ But, considering non-legal issues may require Jack to move beyond his initial schemas.

Similarly, when Jack interviews Carl about the problems with Henrietta Homeowner's patio and Edna regarding her job situation he should be careful to probe their answers, to ensure that they are describing things that they know, and not just what they assumes based on their schemas. For example, who made the decision that Edna should be part of the layoff? What criteria were used to determine who should be included in the layoff? What kinds of evaluations did the employees who were not laid off receive and how did those compare to Edna's evaluations? Does Edna know as much as she thinks

⁴² See generally Solomon E. Asch, *Forming Impressions of Personality*, 41 J. ABNORMAL & SOC. PSYCHOL. 258 (1946). Preconceptions can also influence behavior. For example, the name of a prisoner's dilemma game can influence people's decisions about whether to cooperate or defect. When the game is called the "Wall Street Game" players are more likely to defect than when the game is the "Community Game." Varda Liberman et al., *The Name of the Game: Predictive Power of Reputations Versus Situational Labels in Determining Prisoner's Dilemma Game Moves*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1175, 1177 (2004).

⁴³ Relis, *supra* note 14, at 362–63, 382–83 (describing empirical research on medical malpractice attorneys and plaintiffs indicating that whereas the attorneys assume plaintiffs are primarily or exclusively interested in money, plaintiffs are far more interested in principles, and in obtaining relief such as admissions of fault or responsibility, ensuring the bad acts did not happen again, receiving answers to their questions, or securing apologies). See also Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 44 (1982) (noting lawyers' tendency to reduce nonmonetary goals to money).

⁴⁴ Relis, *supra* note 14, at 348–49. The extensive literature on client-centered counseling is geared to help lawyers escape their own schemas and focus more on what clients actually want. See generally COCHRAN, JR. ET AL., *supra* note 8; BINDER ET AL., *supra* note 8.

⁴⁵ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007) (allowing lawyers to counsel on non-legal issues and also to refer clients to experts in other fields). However, it is true that it is possible for an attorney to focus so extensively on non-legal matters, that the attorney might expose herself to malpractice liability. See Larry O. Natt Gantt II, *More than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 386–97 (2005).

she knows? In addition, lawyers always need to be careful that their own analyses are not inappropriately affected by their own preconceptions. Although it will inevitably be difficult for lawyers to be sufficiently self-aware such that they are conscious of their own preconceptions, they ought to strive to rein in such biases to the extent possible.

Relatedly, psychology also teaches that individuals tend to exhibit a confirmatory bias in the ways in which they seek out and evaluate information. As a general matter, people unconsciously tend to seek out additional information that confirms their already existing views and disregard conflicting information, rather than attempting to systematically gather accurate information.⁴⁶ Moreover, when evaluating information once it is obtained, there is a tendency for assessments of the information to be influenced by the extent to which the information is consistent with the attitudes or expectations of the person doing the evaluation—a tendency known as biased assimilation.⁴⁷ Information that is inconsistent with expectations or beliefs is discounted and scrutinized more carefully than is expectation-congruent data. For example, one study asked participants to review a police file, evaluate the evidence, and make decisions about further investigation. Participants who were asked to name a suspect after reviewing the file demonstrated confirmatory bias in seeking out and interpreting additional investigatory information. Specifically, they were more likely than participants who did not name a suspect to remember evidence consistent with the named suspect's guilt, to discount evidence inconsistent with the named suspect's guilt, to interpret ambiguous evidence in ways consistent with the named suspect's guilt, and to choose to pursue lines of investigation

⁴⁶ Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

⁴⁷ See Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979) ("[J]udgments about the validity, reliability, relevance, and sometimes even the meaning of proffered evidence are biased by the apparent consistency of that evidence with the perceiver's theories and expectations."). See, e.g., Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568 (1992) (finding biased assimilation in the review of medical test results); Geoffrey D. Munro & Peter H. Ditto, *Biased Assimilation, Attitude Polarization, and Affect in Reactions to Stereotype-Relevant Scientific Information*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 636 (1997) (finding biased assimilation in evaluations of research on homosexuality); Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers' Socio-political Attitudes on their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31 (1999) (finding biased assimilation in state court judges' and law students' evaluations of research on capital punishment).

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that focused on the named suspect.⁴⁸

Knowledge of this bias may aid Jack when he interviews Carl Cementa about the alleged defects in Henrietta's patio. It may turn out that from Carl's perspective, Henrietta was a pain-in-the-neck client from the outset. Perhaps she was very picky about the work Carl did—frequently asking Carl to redo his plans even though the job was quite minor by his standards—and was rude in her conversations with Carl. If Jack realizes that Carl comes into this dispute with the predisposition that Henrietta's complaints are unfounded, Jack may be able to help Carl take a step back and consider whether there might be some actual problems that need to be addressed.

Interviewers have been shown to be subject to the confirmation bias as well. For example, a study by Saul Kassin and his colleagues found that interviewers who were led to believe that an interviewee was likely guilty of a theft asked a higher proportion of questions that were consistent with the interviewee's guilt ("guilt-presumptive"), used more interrogation techniques early in the interview, and were more likely to judge the interviewee guilty than were interviewers who were led to believe that the interviewee was likely innocent.⁴⁹

⁴⁸ Barbara O'Brien & Phoebe Ellsworth, *Confirmation Bias in Criminal Investigations* 22–23 (Sept. 19, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=913357>. See also Harold H. Kelley, *The Warm-Cold Variable in First Impressions of Persons*, 18 J. PERSONALITY 431 (1950) (finding that students' evaluations of lecturers and their classroom behavior were influenced by their prior expectations); E. Tory Higgins et al., *Category Accessibility and Impression Formation*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 141 (1977). Thus, people may maintain belief in a theory even in the face of contrary, even discrediting, evidence—a phenomenon known as belief perseverance. Craig A. Anderson, *Belief Perseverance*, in *ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY* (Roy F. Baumeister & Kathleen D. Vohs eds., 2007); Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880 (1975).

⁴⁹ Kassin et al., *supra* note 34, at 187. See also Mark Snyder & William B. Swann, *Hypothesis-Testing Processes in Social Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 1202, 1205 (1978) (finding that interviewers' choice of questions in a "get-acquainted" interview were consistent with pre-existing beliefs about the interviewee). Observers who were not privy to the interviewers' prior beliefs also judged interviewers with a guilt-presumption as having a higher belief in the interviewee's guilt and as exerting more pressure on the interviewee. Kassin et al., *supra* note 34, at 197. These observers also judged interviewees who were interviewed by interviewers with a guilt-presumption as behaving more defensively. *Id.* at 198. See also Ellen J. Langer & Robert P. Abelson, *A Patient By Any Other Name: Clinician Group Difference in Labeling Bias*, 42 J. CONSULTING & CLINICAL PSYCHOL. 4 (1974) (finding that observers of a clinical interview described the interviewee as more disturbed and less well adjusted when they thought he was a "patient" than when they thought he was a "job applicant").

Confirmatory bias and biased assimilation may have particular importance for lawyers—whose training and experience might lead them to pigeonhole clients and cases into readily accessible categories.⁵⁰ While lawyers' expertise allows them to quickly integrate large amounts of information about the facts of their clients' case and the law, such expertise may also lead them to make assumptions, to ask questions designed to confirm those assumptions rather than to disconfirm them, and even to erroneously remember some individuating details.⁵¹ However, it is also possible that lawyers could use their experience to construct and pursue alternative hypotheses that broaden the inquiry.⁵²

Thus, Jack needs to be wary of his own potential biases when he interviews his clients. For example, in chatting with Agnes about her will, Jack may be likely to jump to a conclusion that boyfriend Lenny Lounger is a fortune hunter as to whom Agnes should be wary.⁵³ Yet, it could turn out that Lenny himself is independently wealthy and that Agnes was previously estranged from her own family. By jumping to conclusions too quickly, Jack may ask questions designed to confirm that assumption, may miss out on the

⁵⁰ COCHRAN ET AL., *supra* note 8, at 39 (quoting MELVIN S. HELLER ET AL., AN INTRODUCTION TO LEGAL INTERVIEWING AND COUNSELING 11 (1960) ("The chief danger that confronts a professional, in law or in any other field, is that he will tend to fill the gap with related informational material from other similar situations in his experience. Or, he may leap ahead and begin to anticipate information that may or may not actually be involved in the situation that now confronts him.")). See also Derek J. Koehler et al., *The Calibration of Expert Judgment*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 686, 692–93 (Thomas Gilovich et al. eds., 2002) ("[T]he broader knowledge base of experts might lead them to more readily generate a biased set of reasons favoring the focal hypothesis."); Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 MO. J. DISP. RESOL. 25, 31 (discussing narrowing of disputes due to attorney's categorization of problem from an early point in time).

⁵¹ See Alan D. Castel et al., *The Dark Side of Expertise: Domain-Specific Memory Errors*, 18 PSYCHOL. SCI. 3, 4 (2007) (finding that expertise "can lead to recall of domain-relevant information that was not-presented"). See also Hal R. Arkes & Marilyn R. Freedman, *A Demonstration of the Costs and Benefits of Expertise in Recognition Memory*, 12 MEMORY & COGNITION 84 (1984); Raymond R. Baird, *Experts Sometimes Show More False Recall than Novices: A Cost of Knowing Too Much*, 13 LEARNING & INDIVIDUAL DIFFERENCES 349 (2003); Vimla L. Patel & Guy J. Groen, *The General and Specific Nature of Medical Expertise: A Critical Look*, in TOWARD A GENERAL THEORY OF EXPERTISE 93 (K. Anders Ericsson & Jacqui Smith eds., 1991).

⁵² Koehler et al., *supra* note 50, at 692. (stating that experts may be able to "spontaneously generate alternatives to the focal hypothesis").

⁵³ The fact that Lenny is twenty years younger than Agnes, and that she met him in Las Vegas, might cause Jack to jump to conclusions that could be incorrect.

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opportunity to gather important information, and may also damage his rapport with his clients.

One strategy that has proven helpful in countering the effects of confirmatory bias and biased assimilation is to explicitly "consider the opposite."⁵⁴ That is, when seeking out and evaluating information, one ought to consciously and explicitly reflect on the possibility that one's preconceptions are erroneous and to seek out disconfirming evidence. Psychological research has found that such overt consideration of alternatives is more effective in reducing reliance on preconceptions than is simply making a good-faith effort to be unbiased.⁵⁵ Thus, as Jack chats with Edna Employee, who is convinced that her termination was based on her age and gender, Jack may ask Edna to try to consider whether it is possible that the supervisor who decided to terminate her made the decision based on other legitimate criteria. Or, as Jack discusses the Kiddos' claim that their son's internal injuries due to swallowing the magnets are permanent, Jack may ask them to consider what the perspective of a doctor testifying on behalf of the company is likely to be.

2. Stereotypes

Stereotypes are a category of schemas that categorize people and consist of "beliefs about the characteristics, attributes, and behaviors of members of certain groups."⁵⁶ Thus, people may hold stereotypes based on a person's race or ethnicity,⁵⁷ gender,⁵⁸ age,⁵⁹ weight,⁶⁰ attractiveness,⁶¹ dress,⁶²

⁵⁴ See Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231 (1984).

⁵⁵ Lord et al., *supra* note 54, at 1239–41 (obtaining results consistent with biased assimilation for participants who were instructed to "be unbiased," but *not* for participants who were instructed to "consider the opposite" and suggesting that what is needed is a "change in strategy rather than in motivation"). See also Laura J. Kray & Adam D. Galinsky, *The Debiasing Effect of Counterfactual Mind-sets: Increasing the Search for Disconfirmatory Information in Group Decisions*, 91 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 69, 76 (2003).

⁵⁶ James L. Hilton & William von Hippel, *Stereotypes*, 47 ANN. REV. PSYCHOL. 237, 240 (1996). See also DANIEL L. SCHACTER, *THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS* 153 (2001) ("Stereotypes are generic descriptions of past experiences that we use to categorize people and objects.").

⁵⁷ See, e.g., Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002); Charles M. Judd et al., *Automatic Stereotypes vs. Automatic Prejudice: Sorting Out the Possibilities in the Payne (2001) Weapon Paradigm*, 40 J.

whether or not they smoke,⁶³ or other categories to which people can be assigned.

Most of us don't like to think of ourselves as making decisions that are grounded in stereotypes or prejudice.⁶⁴ Yet, research has shown that we all operate on the basis of stereotypes—racial, ethnic, and otherwise—though we are often not aware of such influence.⁶⁵ To some extent, reliance on stereotypes is not necessarily bad. As with other schemas, stereotypes can facilitate the rapid categorization of people and allow us to "save cognitive resources."⁶⁶ Of course, some stereotypes may have no basis in fact whatsoever, such as the idea that members of a certain race or ethnicity are less intelligent than members of another race or ethnicity. Moreover, even those stereotypes that have a basis in truth are not true in every case. Men in general are stronger than women in general but there are plenty of women

EXPERIMENTAL SOC. PSYCHOL. 75 (2004); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001); Jeff Stone et al., "White Men Can't Jump": Evidence for the Perceptual Confirmation of Racial Stereotypes Following a Basketball Game, 19 BASIC & APPLIED SOC. PSYCHOL. 291 (1997).

⁵⁸ Kay Deaux & Marianne LaFrance, *Gender*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 788, 793–96 (Daniel T. Gilbert et al. eds., 1998).

⁵⁹ Richard L. Hense et al., *Implicit Memory for Age Stereotypes*, 13 SOC. COGNITION 399, 400 (1995); Mary E. Kite & Blair T. Johnson, *Attitudes Toward Older and Younger Adults: A Meta-Analysis*, 3 PSYCHOL. & AGING 233 (1988).

⁶⁰ Richard M. Ryckman et al., *Male and Female Raters' Stereotyping of Male and Female Physiques*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 244 (1989).

⁶¹ Alice H. Eagly et al., *What is Beautiful is Good, But . . . : A Meta-Analytic Review of Research on the Physical Attractiveness Stereotype*, 110 PSYCHOL. BULL. 109 (1991).

⁶² Fabio Sani & Louise Thompson, *We Are What We Wear: The Emergence of Consensus in Stereotypes of Students' and Managers' Dressing Styles*, 29 SOC. BEHAV. & PERSONALITY 695 (2001).

⁶³ Agustin Echebarria Echabe et al., *Social Representations and Intergroup Conflicts: Who's Smoking Here?*, 24 EUR. J. SOC. PSYCHOL. 339 (1994).

⁶⁴ Susan Fiske distinguishes the cognitive (stereotyping), affective (prejudice), and behavioral (discrimination) aspects of the way people respond to people from other groups. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

⁶⁵ A website run by Harvard University allows users to evaluate their own reliance on stereotypes. Project Implicit, <https://implicit.harvard.edu/implicit/> (last visited Oct. 27, 2007).

⁶⁶ Fiske, *supra* note 64, at 367. See also C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93, 96 (2000) ("In attempting to make sense of other people, we regularly construct and use categorical representations to simplify and streamline the person perception process.").

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who are stronger than many men. In short, we are all influenced by stereotypes, and we must be on guard to recognize when stereotypes are either completely or sometimes false.

As with other schemas, stereotypes can shape perceptions of and responses to people from "the earliest moments of encoding."⁶⁷ Accordingly, stereotypes have been shown to influence information processing. For example, one study demonstrated that people asked to distinguish between tools and weapons were able to identify tools more quickly when they were primed with white faces and to identify weapons more quickly when they were primed with black faces.⁶⁸

Stereotypic beliefs are also subject to the same types of confirmatory biases as are other preconceptions. There is evidence that people pay more attention to information that is consistent with a stereotype and less attention to stereotype-inconsistent information, that people seek out information that is consistent with the stereotype,⁶⁹ and that people are better able to remember information that is consistent with the stereotype.⁷⁰ Such preferences for confirmation of stereotypes can make them resistant to change.⁷¹

The stereotyping literature is relevant to client interviewing in several ways. First, attorneys need to bear in mind that they may unconsciously be biased by the appearance of their client, in ways that ultimately may prove not to be accurate. Jack may, for example, make incorrect assumptions about Kyle and his parents because they are African-American. Perhaps he will have a tendency to assume they are poor or that they are not particularly good parents? Similarly, Jack may incorrectly assume that Edna, a middle-aged woman, would not be good at the computer-related side of her job. Jack needs to recognize the likelihood that he is influenced by stereotypes so that he can make efforts to ask questions that will take him beyond these stereotypes.⁷² Otherwise, he may have difficulty establishing rapport with his

⁶⁷ *Id.* at 368.

⁶⁸ Payne, *supra* note 57, at 185. Moreover, participants were more likely to misidentify tools as weapons when the tool was primed with a black face than they were when the tool was primed with a white face. *Id.* at 188.

⁶⁹ Fiske, *supra* note 64, at 368. See also Snyder and Swann, *supra* note 49.

⁷⁰ Fiske, *supra* note 64, at 371.

⁷¹ See *id.* at 368 ("Stereotypes allow people to assimilate a person who fits within the generally accepted boundaries of the outgroup, making people seem more similar to their stereotype than they actually are.").

⁷² See Macrae & Bodenhausen, *supra* note 66, at 109 ("[F]or perceivers to avoid or make adjustments for the possible influence of unwanted mental contents, such as stereotypic thoughts, they must first be aware that such influences are a possibility in the

clients and may fail to learn all the information that might have been helpful to his clients' causes.⁷³

Second, attorneys need to be aware that clients' stereotypes may influence their own perceptions of events. Carl Cementa's views of Henrietta, for example, may be influenced by his negative views towards members of a group to which Henrietta belongs—by Henrietta's race, religion, or age—and these views likely influence his interpretation of his dispute with Henrietta.

Third, attorneys also need to remember that their own appearance and presentation inevitably creates an impression on clients, whether positive or negative. We have learned that Jack's philosophy is that clients should appreciate him for his brain, and that appearance matters very little. For this

first place."). There is evidence that the monitoring processes that are used to suppress stereotypes can prime the stereotype and, therefore, result in *better* memory for stereotypic characteristics. See, e.g., Adam D. Galinsky & Gordon B. Moskowitz, *Further Ironies of Suppression: Stereotype and Counterstereotype Accessibility*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 833, 839 (2007); C. Neil Macrae et al., *Out of Mind But Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808, 814 (1994); Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCHOL. REV. 34, 47 (1994). However, other research has shown that under some circumstances people can inhibit stereotype activation or avoid using stereotypes in decisionmaking. See, e.g., Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 15 (1989); Kerry Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. PERSONALITY & SOC. PSYCHOL. 871 (2000); Margo J. Monteith, *Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice-Reduction Efforts*, 65 J. PERSONALITY & SOC. PSYCHOL. 469, 483 (1993); Gordon B. Moskowitz et al., *Preconscious Control of Stereotype Activation Through Chronic Egalitarian Goals*, 77 J. PERSONALITY & SOC. PSYCHOL. 167, 182 (1999).

⁷³ As attorneys assess clients' likelihood of success in a dispute they must, unfortunately, factor in the extent to which a client's characteristics might positively or negatively influence a jury or judge. Some clients may have great cases, but if their appearance or manner will cause a judge or jury to disbelieve them or cast their claims in a negative light, this is an unpleasant reality both lawyer and client may need to confront. See, e.g., Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315, 1315 (1994). While Jack may not, in an initial interview, want to be so blunt as to say that "judges and juries in our jurisdiction don't tend to like persons" in a particular category, Jack may want to address this issue with his clients in a more subtle way. For example, in talking to the Kiddo family Jack could let them know that if the case goes to trial the strengths and weaknesses of their claim to product liability will not be determined by Jack, the Kiddos, or the kinds of people with whom the Kiddos tend to socialize. Instead, the judge or jury may include some people who do not necessarily think highly of African-Americans' parenting skills, and thus blame the parents for the injuries suffered by Kyle.

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reason he often dresses very casually and behaves quite informally. Yet, at least some clients may assume that an attorney who dresses quite casually and behaves informally is not well-established or good at his job.⁷⁴

3. Causal Attribution and Judgments of Responsibility

Another way in which people make sense of the world is by making causal judgments—including making inferences of responsibility, weighing the relative contributions of potential causes, and making predictions about future behavior.⁷⁵ Such causal judgments are often central to legal disputes. Attribution theory in psychology is the study of the ways in which people make attributions of causality or responsibility.⁷⁶ In particular, research shows that people tend to prefer simple causal explanations (monocausality) to more complex theories of causation,⁷⁷ and are more likely to assign responsibility to another person (rather than to another source) when they judge the cause to be internal to and controllable by that person.⁷⁸ Attributing cause to another person can lead to feelings of anger,⁷⁹ and to judgments of

⁷⁴ See, e.g., Gary L. Brase, *The White-Coat Effect: Physician Attire and Perceived Authority, Friendliness, and Attractiveness*, 34 J. APPLIED SOC. PSYCHOL. 2469, 2470–77 (2004); Yoon-Hee Kwon & Julie Johnson-Hillery, *College Students' Perceptions of Occupational Attributes Based on Formality of Business Attire*, 87 PERCEPTUAL & MOTOR SKILLS 987, 992–93 (1998).

⁷⁵ ROSS & NISBETT, *supra* note 38, at 77.

⁷⁶ See generally EDWARD E. JONES, *INTERPERSONAL PERCEPTION* 138–66 (1990); Harold H. Kelley, *The Processes of Causal Attribution*, 28 AM. PSYCHOLOGIST 107 (1973); NISBETT & ROSS, *supra* note 24; BERNARD WEINER, *JUDGMENTS OF RESPONSIBILITY: A FOUNDATION FOR A THEORY OF SOCIAL CONDUCT* 5 (1995).

⁷⁷ NISBETT & ROSS, *supra* note 24, at 17; Arie W. Kruglanski & Donna M. Webster, *Motivated Closing of the Mind: "Seizing" and "Freezing"*, 103 PSYCHOL. REV. 263, 265 (1996).

⁷⁸ WEINER, *supra* note 76, at 6–12 (comparing internal and controllable causes to causes judged to be external or situational, that vary over time, or that are uncontrollable). How one attributes causation may also depend in part on one's explanatory style or habitual way of explaining things. See generally EXPLANATORY STYLE (Gregory McClellan Buchanan & Martin E.P. Seligman eds., 1995); Christopher Peterson, *The Meaning and Measurement of Explanatory Style*, 2 PSYCHOL. INQUIRY 1 (1991).

⁷⁹ See Laurie J. Barclay et al., *Exploring the Role of Emotions in Injustice Perceptions and Retaliation*, 90 J. APPLIED PSYCHOL. 629, 630 (2005); Dacher Keltner et al., *Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception*, 64 J. PERSONALITY & SOC. PSYCHOL. 740 (1993); Brian M. Quigley & James T. Tedeschi, *Mediating Effects of Blame Attributions on Feelings of Anger*, 22 PERSONALITY & SOC.

responsibility, blame, and (sometimes) retaliation.⁸⁰

One aspect of the psychology of attribution with particular relevance for interviewing and counseling clients is known as the fundamental attribution error (or correspondence bias)—the tendency of observers to attribute another person's behavior to dispositional factors (those internal to the person) rather than to situational (external) factors.⁸¹ Despite the fact that much research has demonstrated the power of situational factors on behavior,⁸² people are inclined to attribute a person's behavior to internal personal characteristics rather than to situational constraints. Thus, people attribute the views contained in a speech (say, for example, defending or attacking the notion that marijuana should be legal) to the speaker, even when they know that the person was assigned to speak on that side of the issue.⁸³ Thus, even when people grasp the nature of the situation, they may discount the influence of those situational factors on another's behavior.

Research has also demonstrated an "actor-observer effect," such that people view causation differently when evaluating their own acts, rather than when evaluating others' acts. Specifically, while observers are particularly likely to attribute others' behavior to dispositional factors, they are more likely to attribute their own behavior to situational factors.⁸⁴

PSYCHOL. BULL. 1280 (1996); Paul Rozin et al., *The CAD Triad Hypothesis: A Mapping Between Three Moral Emotions (Contempt, Anger, Disgust) and Three Moral Codes (Community, Autonomy, Divinity)*, 76 J. PERSONALITY & SOC. PSYCHOL. 574, 585 (1999) (finding connections between violations of autonomy and anger); WEINER, *supra* note 76, at 17 ("Anger is an accusation, or a value judgment, that follows from the belief that another person 'could and should have done otherwise.'").

⁸⁰ WEINER, *supra* note 76, at 5.

⁸¹ JONES, *supra* note 76; NISBETT & ROSS, *supra* note 24; ROSS & NISBETT, *supra* note 38, at 4; Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173 (Leonard Berkowitz ed., 1977) ("People's inflated belief in the importance of personality traits and dispositions, together with their failure to recognize the importance of situational factors in affecting behavior, has been termed the 'fundamental attribution error.'").

⁸² ROSS & NISBETT, *supra* note 38, at 27–58 (reviewing studies).

⁸³ See Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1, 7, 10 (1967). See also Michael W. Morris et al., *Misperceiving Negotiation Counterparts: When Situationally Determined Bargaining Behaviors Are Attributed to Personality Traits*, 77 J. PERSONALITY & SOC. PSYCHOL. 52, 53 (1999) (examining attributions in negotiation and finding that negotiators made attributions about their counterparts even though they were aware of the counterparts' situational constraints).

⁸⁴ Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent*

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Knowledge regarding how people think of causation can potentially be very useful to Jack as he conducts his interviews. Edna, for example, may come into the office very angry, and very sure that her supervisor, Sam Super, terminated her because he is sexist and does not like her. She may give short-shrift to situational factors that may have led to the layoffs—such as budget problems—or that may have determined who was laid off—such as who had skills in particular areas. Jack's awareness of persons' tendencies to blame internal rather than external causes may help him see that Edna may be attributing negative internal motives to Sam for actions that were largely driven by circumstances and may help him to ask questions better aimed at accurately assessing the strength of her case.⁸⁵

Knowledge of how causal attributions are made could also help Jack counsel Carl Cementa. Carl may have a tendency to absolve himself and his company of any responsibility for the damage to Harriet's house. He may instead blame Harriet or external factors such as the weather for the problems. And Carl may have a tendency to find a single cause to blame, such as bad weather, rather than a confluence of multiple causes. Jack's knowledge of these tendencies may help Jack ask more pointed questions that may ultimately help Carl see his own role in the problem.

4. Naïve Realism and False Consensus

As discussed above, people construct their reality based on what they pay attention to and as a function of how they construe data via their schemas and expectations. However, people often fail "to recognize the degree to which one's own understanding of the world is the result of an active, constructive process, rather than a passive reception and registering of some external reality"⁸⁶ and, therefore, "fail to recognize or fail to make adequate inferential allowance for the fact that their peers may construe the 'same' situation quite differently."⁸⁷ This "naïve realism" results in the "feeling that [one's] own take on the world enjoys particular authenticity, and that other

Perceptions of the Causes of Behavior, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 82 (Edward E. Jones et al. eds., 1972). See also Michael D. Storms, *Videotape and the Attribution Process: Reversing Actors' and Observers' Points of View*, 27 J. PERSONALITY & SOC. PSYCHOL. 165, 171–72 (1973). For the observer, it is the actor that is salient, but for the actor it is the situation that is salient. See NISBETT & ROSS, *supra* note 24, at 123; Jones & Nisbett, *supra*.

⁸⁵ Jack should also be aware that a judge or jury may fall prey to the fundamental attribution error as well.

⁸⁶ ROSS & NISBETT, *supra* note 38, at 12.

⁸⁷ *Id.* at 85.

actors will, or at least should, share that take, if they are attentive, rational, and objective perceivers of reality and open-minded seekers of truth."⁸⁸ Those affected by naïve realism assume that others who see the world differently do so because they lack sufficient information, are not reasonable, or are otherwise biased in some way.⁸⁹

Naïve realism has a number of implications that are relevant to interviewing and counseling. First, people tend to overestimate the degree to which others share their perspective.⁹⁰ This *false consensus effect* "involves an overestimation of the commonness of one's own responses and reactions."⁹¹ Thus, people believe that their behavior, choices, and beliefs are typical and, therefore, are "less revealing of personal attributes" than are others' contrary behaviors, choices, and beliefs.⁹² In addition, naïve realism has implications for the ways in which people convey information. In particular, people have great difficulty conveying information with which they are familiar to someone who lacks their mental representation of the material. For example, in one telling study, one group of people was asked to tap the rhythms of familiar songs for the second group to identify. The "tappers" (who had mental representations of the songs that included the melody and words) overestimated the likelihood that the "listeners" (who heard only taps) would correctly recognize the songs.⁹³

Finally, secure in the belief that they see the world accurately, people tend to be confident in their abilities to persuade those on the other side and

⁸⁸ Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 646 (Thomas Gilovich et al. eds., 2002); Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in VALUES AND KNOWLEDGE 103, 110–11 (Edward S. Reed et al. eds., 1996).

⁸⁹ Ross & Ward, *supra* note 88. See also Glenn D. Reeder et al., *On Attributing Negative Motives to Others Who Disagree with Our Opinions*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1498, 1499 (2005).

⁹⁰ Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1091 (2003).

⁹¹ Pronin et al., *supra* note 88, at 642. See, e.g., Lee Ross et al., *The False Consensus Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. PERSONALITY & SOC. PSYCHOL. 279 (1977).

⁹² Pronin et al., *supra* note 88, at 642.

⁹³ See *id.* at 643–44. See also Justin Kruger et al., *Egocentrism Over E-Mail: Can We Communicate as Well as We Think?*, 89 J. PERSONALITY & SOC. PSYCHOL. 925, 926 (2005) (finding that senders of e-mail overestimate the degree to which they are able to communicate tone, humor, and emotion to e-mail recipients).

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neutral third-parties of the merits of their position.⁹⁴ However, when efforts to "enlighten" the other side are unsuccessful, people are likely to conclude that such others are unreasonable or biased.⁹⁵ Indeed, the more the other disagrees, the more they are thought to be displaying bias.⁹⁶

Jack could benefit from knowledge of naïve realism in chatting with the Kiddo parents. Perhaps the Kiddos will assume that a wealthy manufacturer of the magnetic balls that caused their son severe injury *must* have a duty to compensate them and their child for the harm that occurred. As the Kiddos see the world, any belief to the contrary on the part of the company simply demonstrates the company's lack of good faith. Yet, Jack may realize that others, and even the law, might construe this situation differently and assess liability to the company only if the product is found to have been defective in its design or if the company was somehow negligent in the way it manufactured or distributed the product.

Jack must also recognize that his own view of the world may be quite different from the Kiddos' view of the world. Perhaps Jack tends to assume that the only reason one would bring a lawsuit is to obtain monetary benefit.⁹⁷ Yet, the Kiddos may see the bringing of a lawsuit as a moral statement—a way to ensure that an evil company is called to account for its bad action.⁹⁸ Jack needs to be aware of and probe for the many ways in which his clients' world view may differ from his own in order to effectively interview and counsel his clients.

B. Cognitive Heuristics

Cognitive heuristics are ways in which people simplify or take shortcuts in making judgments. Much of the time these shortcuts are efficient routes to accurate judgments. However, on occasion, reliance on these heuristics can produce systematic errors in judgment. An understanding of how these cognitive heuristics influence judgment can aid Jack as he interviews and

⁹⁴ Ross & Shestowsky, *supra* note 90, at 1091. See also Lee Ross & Andrew Ward, *Psychological Barriers to Conflict Resolution*, in 27 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 255, 265 (Leonard Berkowitz ed., 1995); Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 176, 193 (1992) (finding that disputants are overly optimistic about third-party decisions).

⁹⁵ Ross & Ward, *supra* note 88.

⁹⁶ Pronin et al., *supra* note 16, at 781.

⁹⁷ See Relis, *supra* note 14.

⁹⁸ *Id.* at 341.

counsels his clients.⁹⁹

1. Availability

People tend to judge the likelihood of an event by the ease with which they can recall examples of similar events.¹⁰⁰ Therefore, events that are more available in memory—because they are more vivid, have been repeated more often, are concrete (as opposed to abstract), are more recent, hold emotional interest, or otherwise come to mind more easily—are judged to be more common.¹⁰¹ In contrast, less memorable but more probative information, such as statistical summaries, tend to hold less interest.¹⁰² Availability also influences judgments of causality—the more common an event is judged to be, the more likely it is thought to have a causal influence.¹⁰³ Thus, people tend to estimate that motor vehicle accidents (highly available in memory) cause more deaths per year than stomach cancer, even though the reverse is true.¹⁰⁴

Knowledge of the availability heuristic may help Jack understand why Edna feels so wronged by her termination, and feels her chances of success are high, even though her claim may not in the end be particularly strong. Instances of gender and age discrimination may be available in Edna's mind as she has read about successful lawsuits in the newspaper or has heard about

⁹⁹ Not all heuristics are reviewed here. See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 4–11 (Daniel Kahneman et al. eds., 1982) (describing the representativeness heuristic).

¹⁰⁰ Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163 (Daniel Kahneman et al. eds., 1982).

¹⁰¹ NISBETT & ROSS, *supra* note 24, at 8; Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463 (Daniel Kahneman et al. eds., 1982).

¹⁰² See Ruth Hamill et al., *Insensitivity to Sample Bias: Generalizing from Atypical Cases*, 39 J. PERSONALITY & SOC. PSYCHOL. 578, 586–88 (1980); Amos Tversky & Daniel Kahneman, *Evidential Impact of Base Rates*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 153, 153 (Daniel Kahneman et al. eds., 1982).

¹⁰³ NISBETT & ROSS, *supra* note 24, at 22.

¹⁰⁴ See J. EDWARD RUSSO & PAUL J.H. SCHOEMAKER, DECISION TRAPS: TEN BARRIERS TO BRILLIANT DECISION-MAKING AND HOW TO OVERCOME THEM 82–83 (1989) (reviewing 2 newspapers over a 1-year period and finding 137 articles about deaths in motor vehicle accidents and only 1 story about a stomach cancer death). *Id.* at 83.

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them from friends.¹⁰⁵ Such familiarity may lead her to judge the likelihood of discrimination as high or to predict that she is likely to win her case. Yet, newspapers report plaintiff victories more often than defeats,¹⁰⁶ and Jack may find that statistical information regarding the company's approach to the layoff paints a different portrait of the layoffs. However, such aggregate information is likely to be less compelling to Edna than more colorful anecdotes involving purported discrimination. Jack may, therefore, find it useful to use concrete, vivid, examples in trying to communicate this information to his client—such communication may have a stronger impact than summary statistics.¹⁰⁷

Further, Jack needs to guard against his own tendencies to fall prey to the availability heuristic. As he helps his clients assess their likelihood of success he should try to look to statistical information, rather than be guided by his gut feeling as to the likely success of a particular claim or defense.

2. Anchoring

Anchoring and adjustment is a phenomenon by which available values—even irrelevant values—provide a starting point (or "anchor") for a judgment; adjustments are then made away from the anchor, but are often insufficient.¹⁰⁸ For example, in one classic study, participants' estimates of the number of African countries in the U.N. were influenced by their prior assessments of whether the correct percentage was higher or lower than an arbitrary number (determined by spinning a "wheel of fortune").¹⁰⁹ In the legal context, juror judgments and settlement decisions have been shown to be influenced by anchors provided by *ad damnum* requests¹¹⁰ and damage

¹⁰⁵ See generally Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 LAW & HUM. BEHAV. 5 (2003).

¹⁰⁶ See generally Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419 (1996); Robbennolt & Studebaker, *supra* note 105.

¹⁰⁷ See NISBETT & ROSS, *supra* note 24, at 281–82 (advocating "Teaching by Concrete Illustrations and Vivid Anecdotes").

¹⁰⁸ Tversky & Kahneman, *supra* note 99, at 14–18.

¹⁰⁹ *Id.* at 14. See also SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 146 (1993) (describing unpublished study in which estimates of average temperature in San Francisco were influenced by answering previous question about whether such average was higher or lower than 58°).

¹¹⁰ See Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL.

caps,¹¹¹ and the media.¹¹² Similarly, first offers in negotiation have been shown to anchor final negotiated outcomes.¹¹³

Jack needs to know about anchoring so as to avoid inadvertently anchoring his clients to a particular valuation during the initial interview and to address other anchors that his clients might encounter. For example, were Jack to say to the Kiddos, "I think we have a million dollar claim here," it might prove difficult for the Kiddos to accept a settlement for less than a million dollars down the road, even if the Kiddos had been subsequently informed of weaknesses in their case. Or, if Jack were to say to Carl Cementa, "I think you have a good shot at getting rid of this claim for nuisance value," Jack might later come to regret this comment if he and Carl learned that Harriet's case were actually quite strong.¹¹⁴

3. *Positive Illusions*

Psychological research has found that people perceive the world in more positive terms than they might if they were being completely objective.¹¹⁵ In

519, 522 (1996); Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445 (1999); Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991, 1005, 1010, 1013-15 (1995); John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damages Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491, 494 (1989). See also Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 802-03 (2001) (anchoring effect of diversity amount on judges' damage awards).

¹¹¹ See Hinsz & Indahl, *supra* note 110; Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353, 359 (1999); Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243, 252 (1997).

¹¹² See Robbennolt & Studebaker, *supra* note 111, at 367-70 (reviewing studies).

¹¹³ See Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1 (1994) (anchoring effect of first offer in settlement negotiation).

¹¹⁴ See also Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 802 (1998) (discussing management of client expectations by "avoiding reference to specific figures for case outcomes, deflating expectations, and emphasizing uncertainty"); Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783, 802 (2003) (arguing in the criminal law context that lawyers should "resist the temptation to make early diagnoses and predictions").

¹¹⁵ See generally SHELLEY E. TAYLOR, POSITIVE ILLUSIONS: CREATIVE SELF-

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particular, people have a tendency to be overconfident in the forecasts that they make—failing to sufficiently allow for uncertainty in their judgments.¹¹⁶ Therefore, for example, people routinely underestimate the time they will need to complete a task (the "planning fallacy"),¹¹⁷ anticipate that they will enjoy their jobs¹¹⁸ and their vacations¹¹⁹ more than they actually do, underestimate the likelihood that they will suffer from ill-health,¹²⁰ and predict that they will not divorce.¹²¹ Experts, too, demonstrate

DECEPTION AND THE HEALTHY MIND (1989); Shelley E. Taylor & Jonathon D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 PSYCHOL. BULL. 193 (1988).

¹¹⁶ See Sarah Lichtenstein et al., *Calibration of Probabilities: The State of the Art to 1980*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 306, 314 (Daniel Kahneman et al. eds., 1982); David A. Armor & Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 334, 334 (Thomas Gilovich et al. eds., 2002) ("One of the most robust findings in the psychology of prediction is that people's predictions tend to be optimistically biased. By a number of metrics and across a variety of domains, people have been found to assign higher probabilities to their attainment of desirable outcomes than either objective criteria or logical analysis warrants."). Such overconfident predictions are more likely the more uncertainty is involved in the prediction. *Id.* at 338. Interestingly, "research has found that optimistic biases are attenuated when people are choosing between goals, but exaggerated once a particular goal is selected and the individual begins thinking about implementing particular plans for action." *Id.* at 340. Another aspect of over-optimism is that people tend to overestimate their ability to control events and outcomes that are not within their control. Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311, 323–27 (1975); Taylor & Brown, *supra* note 115, at 196. See also Paul K. Presson & Victor A. Benassi, *Illusion of Control: A Meta-Analytic Review*, 11 J. SOC. BEHAV. & PERSONALITY 493, 502–06 (1996).

¹¹⁷ Roger Buehler et al., *Exploring the "Planning Fallacy": Why People Underestimate Their Task Completion Times*, 67 J. PERSONALITY & SOC. PSYCHOL. 366, 373 (1994). See also Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 MGMT. SCI. 17, 26–27 (1993).

¹¹⁸ Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 812 (1980).

¹¹⁹ Terence R. Mitchell et al., *Temporal Adjustments in the Evaluation of Events: The "Rosy" View*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 421, 428 (1997).

¹²⁰ Linda S. Perloff & Barbara K. Fetzer, *Self-Other Judgments and Perceived Vulnerability of Victimization*, 50 J. PERSONALITY & SOC. PSYCHOL. 502, 502 (1986); Neil D. Weinstein, *Unrealistic Optimism About Susceptibility to Health Problems: Conclusions from a Community-Wide Sample*, 10 J. BEHAV. MED. 481 (1987).

¹²¹ See, e.g., Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 442–43 (1993).

overconfidence—for example, financial analysts tend to overestimate earnings.¹²² Similarly, people tend to have unrealistically positive views of themselves—perceiving themselves to be "better than average" on a variety of dimensions and perceiving themselves in more positive terms than do observers.¹²³ Research has shown, for instance, that the majority of people estimate that they are above average drivers,¹²⁴ and that most negotiators think that they are above average negotiators.¹²⁵

Manifesting a related bias—the self-serving (or egocentric) bias, people often make judgments about events in ways that are consistent with their own interests.¹²⁶ Thus, for example, spouses' estimates of their contributions to the work of the household add up to more than 100%,¹²⁷ as do authors'

¹²² Thomas G. Calderon, *Predictive Properties of Analysts' Forecasts of Corporate Earnings*, 29 MID-ATLANTIC J. BUS. 41, 42 (1993); Andrew L. Zacharakis & Dean A. Sheperd, *The Nature of Information and Overconfidence on Venture Capitalists' Decision Making*, 16 J. BUS. VENTURING 311, 322–23 (2001) (showing such an effect for venture capitalists). See also Chi, *supra* note 39, at 25 (reviewing studies of experts and overconfidence).

¹²³ See generally Taylor & Brown, *supra* note 115.

¹²⁴ See, e.g., Ola Svenson, *Are We Less Risky and More Skillful Than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143 (1981). See also James R. Dalziel & R.F. Soames Job, *Motor Vehicle Accidents, Fatigue and Optimism Bias in Taxi Drivers*, 29 ACCIDENT ANALYSIS & PREVENTION 489, 493 (1997) (showing such an effect for taxi drivers); D. Walton, *Examining the Self-Enhancement Bias: Professional Truck Drivers' Perceptions of Speed, Safety, Skill and Consideration*, 2 TRANSP. RES. 91, 99 (1999) (showing such an effect for truck drivers).

¹²⁵ See Roderick M. Kramer et al., *Self-Enhancement Biases and Negotiator Judgment: Effects of Self-Esteem and Mood*, 56 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 110, 124 (1993); Leigh Thompson & Reid Hastie, *Judgment Tasks and Biases in Negotiation*, in 2 RESEARCH ON NEGOTIATION IN ORGANIZATIONS 31, 43 (Blair H. Sheppard et al. eds., 1990). Interestingly, such unrealistically positive views also operate at the group level—with a tendency for people to view others in their group more positively (and above average) than they view others. See generally Jonathon D. Brown, *Evaluations of Self and Others: Self-Enhancement Biases in Social Judgment*, 4 SOC. COGNITION 353 (1986); Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in PSYCHOLOGY OF INTERGROUP RELATIONS (Stephen Worchel & William G. Austin eds., 1986). Members of one's own group are more often credited with successes, more likely to be seen as honest and trustworthy, and thought to be more cooperative. *Id.*

¹²⁶ See generally MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 99–101 (4th ed. 1998); Michael Ross & Fiore Sicol, *Egocentric Biases in Availability and Attribution*, 37 J. PERSONALITY & SOC. PSYCHOL. 322 (1979).

¹²⁷ See, e.g., Ross & Sicol, *supra* note 126. See also David M. Messick & Keith P. Sentis, *Fairness and Preference*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 418 (1979)

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estimates of their contributions to a joint work.¹²⁸ Similarly, sports fans from opposing teams make self-serving judgments about the fairness and conduct of the teams in the game.¹²⁹ Self-serving bias no doubt affects lawyers as well as their clients. For example, Chris Guthrie and his colleagues showed that a large majority of the magistrate judges in their study estimated that at least half of their peers had higher reversal rates on appeal than they did.¹³⁰ In addition, several studies have shown that litigants and their representatives make biased estimates of the fair settlement value of civil cases and predictions about what a neutral decisionmaker will award—those on the plaintiff side make higher estimates than do those on the defense side.¹³¹

Given this psychology, it would not be surprising if Agnes Ageout were quite optimistic about her longevity, the nature and future of her relationship with Lenny Lounger, and the likelihood that her own children and grandchildren would fail to contest her will if she chooses to leave all her assets to Lenny. Jack may need to gently warn Agnes that some of her assumptions may be overly optimistic. Similarly, it would not be surprising if Edna Employee represented her contributions to the company in a very positive manner, or if Carl Cementa was very positive on the quality of work done by his company. Jack needs to be prepared for the fact that further investigation and discovery may show that their perspectives may be subject to challenge. It is not necessarily that Edna or Carl would lie, but just that they would naturally present their contributions in a very positive light.

At the same time, Jack needs to be aware of his own tendencies towards over-optimism. It is natural that a lawyer like Jack would be quite confident in his own abilities to win a case at trial or to procure a good settlement for his client. Jack needs to guard against these tendencies in attempting to help his client decide whether to pursue a claim at all, and how to pursue that claim. Jack can take some comfort, at this initial stage of client

(demonstrating the self-serving bias in mechanisms for compensating joint work).

¹²⁸ TAYLOR, *supra* note 115, at 18.

¹²⁹ Hastorf & Cantril, *supra* note 35.

¹³⁰ Guthrie et al., *supra* note 110, at 802–03. *See also* Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979 (1994) (reporting study of bankruptcy judges' and lawyers' perceptions of lawyers' fees).

¹³¹ *See* Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995); Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993); Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 176 (1992).

representation, from the fact that research has shown less of a tendency toward over-optimism when choosing between options, such as doing nothing, attempting a quick settlement, or commencing litigation.¹³² Later, once Jack and his client have potentially commenced litigation, they will need to be even more wary of the dangers of over-optimism. Similarly, Jack must be attentive to the effects of self-serving bias. Jack's awareness of the tendency to make self-serving evaluations of his clients' cases can help him and his clients see that their assessments and predictions may not be shared by others.

4. *Hindsight Bias*

A related bias—hindsight bias—is the tendency to unconsciously overestimate the likelihood one would have assigned to an event once the outcome is known.¹³³ Thus, people predicting the outcome of an event after the fact are more certain that they would have predicted the actual outcome than are those who attempt to predict in foresight—resulting in a feeling that they "knew it all along."¹³⁴ Following the injury to their son, the Kiddos may feel that it should have been obvious to the magnetic ball manufacturer, from the outset, that a defect in their product would cause an injury to a child. Yet, while this may be a manifestation of hindsight bias on the part of the Kiddos, Jack can also take some comfort from the idea that a judge or jury could eventually suffer from that same bias.¹³⁵

5. *Affect Heuristic*

Judgment is also affected by a phenomenon psychologists call the "affect heuristic."¹³⁶ People tend to make judgments based on an "overall, readily

¹³² See *supra* note 116 and accompanying text.

¹³³ See Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL: HUM. PERCEPTION & PERFORMANCE 288 (1975); Baruch Fischhoff & Ruth Beyth, *"I Knew It Would Happen": Remembered Probabilities of Once Future Things*, 13 ORG. BEHAV. & HUM. PERFORMANCE 1 (1975); Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 PSYCHOL. BULL. 311 (1990).

¹³⁴ See *supra* note 133 and accompanying text.

¹³⁵ See generally Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998) (exploring the complex interface between hindsight bias and legal judgments).

¹³⁶ See generally Melissa L. Finucane et al., *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1 (2000); Paul Slovic et al., *The*

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available affective impression"—using their feelings toward the object of judgment as a guide.¹³⁷ Thus, for example, people may rely on their general feelings toward activities such as nuclear power or cellular phones to make judgments about the activities' risks and benefits. Similarly, we might expect people to judge others (clients, lawyers, opponents) or courses of action (do nothing, file a lawsuit) with regard to their general affect toward those people or actions. If the company that manufactured the magnetic balls that injured Kyle Kiddo were Chinese, during a period when Chinese companies are being widely reported to have manufactured shoddy or dangerous merchandise, that might cause Jack, the Kiddos, or a judge or jury to more readily find the company culpable. Or, if Jack's mother were an administrator for a company similar to the pharmacy company at which Edna worked, Jack's assessment of Edna's company might be colored, for better or for worse, by his feelings toward his mother's company. Similarly, Edna might discount the benefits and emphasize the costs of filing a lawsuit due to her negative emotional reaction to the concept of litigation. Jack needs to guard against such errors, whether his own or his clients'.

C. Memory

Jack, like many law students and particularly new attorneys, believes human memories are better than they really are. Psychologists have demonstrated that both short-term and long-term memories are extremely frail. As in the movie *Rashomon*,¹³⁸ different people's descriptions of the

Affect Heuristic, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 397 (Thomas Gilovich et al. eds., 2002); Paul Slovic & Ellen Peters, *Risk Perception and Affect*, 15 CURRENT DIR. IN PSYCHOL. SCI. 322 (2006). See also George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267 (2001) (describing the "risk as feelings" hypothesis); Norbert Schwartz & Gerald L. Clore, *How Do I Feel About It? Informative Functions of Affective States*, in AFFECT, COGNITION, AND SOCIAL BEHAVIOR: NEW EVIDENCE AND INTEGRATIVE ATTEMPTS 44 (Klaus Fiedler & Joseph Forgas eds., 1988) (describing the role of affect as information). For a recent example see Dan M. Kahan et al., *Affect, Values, & Nanotechnology Risk Perceptions: An Experimental Investigation* (Yale Law Sch., Pub. Law Working Paper No. 155, 2008), available at <http://ssrn.com/abstract=968652>.

¹³⁷ Slovic et al., *supra* note 136, at 400.

¹³⁸ RASHOMON (Daiei Motion Picture Co. Ltd. 1950). Directed by Akira Kurosawa, the film describes a rape and murder. But, the various eyewitness accounts of the crime, including by the perpetrator and the victim (speaking through a medium) are inconsistent, and viewers never learn a "truth" of what actually transpired. See Wikipedia, *Rashomon*, [http://en.wikipedia.org/wiki/Rashomon_\(film\)](http://en.wikipedia.org/wiki/Rashomon_(film)) (last visited Nov. 1, 2007). See also Atul Gawande, *Investigations Under Suspicion: The Fugitive Science of Criminal Justice*, THE

same event often vary significantly. It is not merely that people misremember whether someone was wearing a red or green shirt. We also do a poor job of remembering very significant events, their timing, the order in which events took place, or who was present:

Our minds are not capable of making complete records of events; rather we encode features selectively. Even when we do remember events reasonably well, we do not come close to remembering all the fine details that are part of the event. We are not like video recorders, faithfully taking in and storing all the details in a scene.¹³⁹

Interviewers should be concerned with clients' ability to remember relevant information (i.e., quantity), with the degree to which the information reported by clients is accurate (i.e., quality), and with the interviewer's own ability to recall the content of the interview itself.¹⁴⁰ However, both clients and attorneys may be unable to provide relevant and accurate details because they did not attend to or encode such details accurately at the time the event occurred,¹⁴¹ because they have forgotten, or because their memories have become distorted since the event occurred.

1. *How Memory Works*

We have seen that not all details of an event attract our attention and that significant interpretation takes place as events occur.¹⁴² But even details that were noticed and could have been accurately reported immediately after the event may be forgotten. Working memory "holds on to small amounts of information for short periods of time—usually a few seconds—while people engage in such ongoing cognitive activities as reading, listening, problem solving, reasoning, or thinking." However, to be retained, this information must be transferred from short-term working memory to long-term memory:

NEW YORKER, Jan. 8, 2001, at 50.

¹³⁹ Henry L. Roediger III & David A. Gallo, *Processes Affecting Accuracy and Distortion in Memory: An Overview*, in *MEMORY AND SUGGESTIBILITY IN THE FORENSIC INTERVIEW* 3, 8 (Mitchell L. Eisen et al. eds., 2002).

¹⁴⁰ See Asher Koriat & Morris Goldsmith, *Memory in Naturalistic and Laboratory Contexts: Distinguishing the Accuracy-Oriented and Quantity-Oriented Approaches to Memory Assessment*, 123 J. EXPERIMENTAL PSYCHOL.: GENERAL 297 (1994) (distinguishing the storehouse conception of memory which focuses on quantity and the correspondence metaphor for memory which focuses on accuracy).

¹⁴¹ See *supra* Part III.A.1.

¹⁴² See *supra* Part III.A.

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"the system must constantly discard what is no longer needed at the moment, and devote its resources to the temporary storage of incoming information. Unless special effort is made—such as repeating a sentence over and over again—information is lost from the system almost immediately after it enters."¹⁴³

Moreover, even memories that are stored in long-term memory tend to deteriorate as time passes:

At relatively early points on the forgetting curve—minutes, hours, and days, sometimes more—memory preserves a relatively detailed record, allowing us to reproduce the past with reasonable if not perfect accuracy. But with the passing of time, the particulars fade and opportunities multiply for interference . . . to blur our recollections.¹⁴⁴

Test yourself, and you will likely find that you no longer remember things that were once deeply embedded in your memory, such as an old home phone number, how to drive to a particular location, or the name of grade school teachers or old friends.

In addition, there are a variety of "ways in which what is remembered can depart from what actually occurred."¹⁴⁵ For example, people sometimes remember events in ways that are distorted from what actually happened, combine aspects of multiple events into a single memory, or remember events that did not happen.

One factor that leads to many of these errors is that people have difficulty with what is called "source monitoring."¹⁴⁶ When people try to remember something they do not call up a perfectly accurate real-time recording of the event. Instead, they access a range of sources of information including their own "internal mental representation of the event," other basic information they have about how the world works, their schemas for how events such as this one typically happen, what they have been told by others about what happened, their experiences in other similar situations, stereotypes, what they imagined doing, and so on.¹⁴⁷ A large body of

¹⁴³ SCHACTER, *supra* note 56, at 27–28.

¹⁴⁴ *Id.* at 15–16. See also HERMANN EBBINGHAUS, *MEMORY: A CONTRIBUTION TO EXPERIMENTAL PSYCHOLOGY* (Dover 1964).

¹⁴⁵ Asher Koriat et al., *Toward a Psychology of Memory Accuracy*, 51 ANN. REV. PSYCHOL. 481, 517 (2000).

¹⁴⁶ See Marcia K. Johnson et al., *Source Monitoring*, 114 PSYCHOL. BULL. 3, 4 (1993); Marcia K. Johnson, *Memory and Reality*, 61 AM. PSYCHOLOGIST 760, 761 (2006).

¹⁴⁷ Ronald P. Fisher, *Interviewing Victims and Witnesses of Crime*, 1 PSYCHOL.,

psychological research has demonstrated that people have difficulty discriminating between these different sources of information.¹⁴⁸ Thus, when someone tries to remember whether he turned off the stove before he left the house and seems to remember doing it, he may have difficulty determining whether he actually did it, or just thought about doing it, or remembered doing it on a different occasion.

One consequence of these difficulties in source monitoring is that people can be suggestible—exposure to information from sources other than what was actually observed can influence memories of what happened, altering details of memory or introducing new elements.¹⁴⁹ For example, in one study participants viewed a videotape of an automobile accident. Next, they were asked a series of questions about the accident—including a question that asked about the speed of the car as it passed a barn. When asked questions about the accident one week later, 17% of participants reported having seen a barn, despite the fact that there had not been a barn in the video.¹⁵⁰

Finally, in a phenomenon with particular relevance to legal disputes, memories can be distorted when people make judgments that attribute blame. For example, in one study memory of an event—a customer leaving a

PUB. POL'Y, & L. 732, 738 (1995).

¹⁴⁸ See generally Johnson et al., *supra* note 146; Mara Mather et al., *Stereotype Reliance in Source Monitoring: Age Differences and Neuropsychological Test Correlates*, 16 COGNITIVE NEUROPSYCHOLOGY 437 (1999). Thus, people tend to identify things that are familiar or predictable as being remembered. See Bruce W.A. Whittlesea, *Illusions of Familiarity*, 19 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 1235, 1239 (1993).

¹⁴⁹ See SCHACTER, *supra* note 56, at 113 ("Suggestibility in memory refers to an individual's tendency to incorporate misleading information from external sources—other people, written materials or pictures, even the media—into personal recollections."). There is evidence that longer delays between the event to be remembered and the interview are associated with greater suggestibility. See, e.g., Jodi A. Quas et al., *Developmental Differences in the Effects of Repeated Interviews and Interviewer Bias on Young Children's Event Memory and False Reports*, 43 DEVELOPMENTAL PSYCHOL. 823 (2007).

¹⁵⁰ Eliabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCHOL. 560, 566 (1975). In a similar study, participants were asked about an accident they had viewed, including either a question about how fast the car was going "when it ran the stop sign" or "when it turned right." *Id.* at 563–65. When later asked if they had seen a stop sign in the video, 53% of those who had been asked the question referencing a stop sign indicated that they had seen a stop sign compared to only 35% of those who had been asked the question referencing a right turn. *Id.* at 564. See also ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1979); Elizabeth F. Loftus et al., *Semantic Integration of Verbal Information into a Visual Memory*, 4 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 19 (1978).

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restaurant without paying—was assessed one week after the event was described.¹⁵¹ As compared to participants who had been provided with a justification for the customer's behavior that tended to attenuate blame, participants who had been led to accentuate blame (i.e., were provided with negative information about the customer) remembered the price of the meal as being higher, were more likely to overestimate the price of the meal, and were more likely to incorrectly report that the customer had also failed to pay for a pre-dinner drink.¹⁵²

2. *Eliciting Memories*

Given the frailty of human memory, attorneys need to know how to help clients access their memories successfully.¹⁵³ Anyone who has experienced the "tip of the tongue" phenomenon knows that having information available in memory is not the same as being able to access it on demand.¹⁵⁴ Psychologists have explored a number of aspects of how people retrieve and report memories that have implications for interviewing clients. Importantly, since the interviewee is the one who possesses the information, the interviewee ought to be the focus of the interview.¹⁵⁵ In particular, interviewers can help interviewees access their memories successfully by asking open-ended questions, avoiding leading questions, asking the

¹⁵¹ David A. Pizzaro et al., *Ripple Effects in Memory: Judgments of Moral Blame Can Distort Memory for Events*, 34 *MEMORY & COGNITION* 550, 552 (2006).

¹⁵² *Id.* at 553. See also Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 *PSYCHOL. BULL.* 556 (2000).

¹⁵³ The ease with which memory can be manipulated may, unfortunately, also tempt some attorneys to try to help their clients "remember" a version of the facts that is most helpful to their side of the case. For purposes of this Article we assume and hope that attorneys are honestly trying to probe their clients' accurate memories, rather than to reshape or change those memories. For discussions of the tension between adequately interviewing and preparing witnesses versus improperly coaching those witnesses' trial testimony see Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 *GEO. J. LEG. ETHICS* 389 (1987) and Richard C. Wydick, *The Ethics of Witness Coaching*, 17 *CARDOZO L. REV.* 1 (1995). A scene from *Anatomy of a Murder* is often used in professional responsibility classes to help students see how a client interview can result in improper coaching of a witness. ROBERT TRAVER, *ANATOMY OF A MURDER* 44–49 (1958) (written under a pseudonym by Judge John D. Voelker).

¹⁵⁴ See Endel Tulving & Zena Pearlstone, *Availability Versus Accessibility of Information in Memory for Words*, 5 *J. VERBAL LEARNING & VERBAL BEHAV.* 381 (1966).

¹⁵⁵ See Fisher, *supra* note 147, at 747.

interviewee to include details that may not seem important, and adopting interviewee-centered sequencing of questions.¹⁵⁶

First, psychological research suggests that interviewers ought to use open-ended questions when possible, following up with focused questions in areas in which more detail is needed. Asking open-ended questions "allows the interviewee time to collect his or her thoughts and consequently promotes more elaborate memory retrieval."¹⁵⁷ Interviewees are able to focus their attention on remembering the event rather than being distracted from this task by a series of interviewer questions.¹⁵⁸ Accordingly, open-ended questions can elicit more accurate information than do more focused questions.¹⁵⁹

In particular, open-ended questions also allow interviewees to control the level of detail they report in their initial responses. For example, a witness could choose to report that a particular event occurred "back in the spring" or that it happened "in April" or that it occurred "on April 10 during the morning break." Psychological research has shown that people intuitively adjust the level of detail that they report so as to choose a level of detail that favors accuracy (even at the expense of some precision) and that they therefore provide a higher proportion of accurate information.¹⁶⁰ This finding

¹⁵⁶ *Id.* at 747–48.

¹⁵⁷ Martine B. Powell et al., *Investigative Interviewing*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 11, 19 (Neil Brewer & Kipling D. Williams eds., 2005).

¹⁵⁸ *Id.* at 19–20 ("Given that witnesses have only limited mental resources with which to process information, any distraction or deflection of these mental resources may impair the ability to remember the critical event. Excessive questioning—as opposed to asking fewer, but open-ended questions—is therefore distracting for witnesses, because the questions redirect their attention from searching internally through memory to focusing externally on the interviewer's next question."). See *supra* Part III.A.1.

¹⁵⁹ See Fisher, *supra* note 147, at 749–53 (reviewing studies); Jack P. Lipton, *On the Psychology of Eyewitness Testimony*, 62 J. APPLIED PSYCHOL. 90, 94 (1977) (finding that responses to open-ended questions were more accurate than responses to multiple-choice questions or leading questions); Koriatic et al., *supra* note 145, at 508 (reviewing studies). See also Debra L. Roter & Judith A. Hall, *Physicians' Interviewing Styles and Medical Information Obtained From Patients*, 2 J. GENERAL INTERNAL MED. 325 (1987) (finding that open-ended questions were related to more patient disclosure of relevant information). Responses to open-ended questions may be less detailed and, therefore, may require follow-up questions. See *infra* note 160 and accompanying text.

¹⁶⁰ See Morris Goldsmith et al., *Strategic Regulation of Grain Size in Memory Reporting*, 131 J. EXPERIMENTAL PSYCHOL.: GENERAL 73, 88 (2002) (finding that people are "at least moderately successful in choosing a grain size that [will] enhance their accuracy with minimal loss of informativeness."); Asher Koriatic & Morris Goldsmith, *Monitoring and Control Processes in the Strategic Regulation of Memory Accuracy*, 103

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is consistent with other research that finds that although people may not be able to completely recreate an event from memory, the information in people's unassisted reports does tend to be quite accurate.¹⁶¹ Thus, interviewees ought not to be initially forced to give specific answers to questions and, instead, should be given the opportunity to control the level of detail in their initial responses, and to indicate that they do not know the answer, are not sure, or cannot remember. A greater degree of confidence can be placed in the accuracy of such unaided, unpressed reports.

It may be inevitable, however, that a lawyer will ultimately have to press the client for further and more precise responses. Clients will likely be able to comply with such requests—people are able to adopt different accuracy and precision thresholds for their reports—although increasing the precision of the information provided can come at a cost to accuracy.¹⁶² One recent study found that when witnesses were forced to guess, more information was provided, but this information included both more correct information *and* more incorrect information.¹⁶³ In addition, there is evidence that "guessing" can result in the same types of source misattribution errors described above, with the witness' conjectures later being remembered as having actually happened.¹⁶⁴ The client, therefore, should be allowed to indicate where she is less sure of such details and both lawyer and client should keep in mind the

PSYCHOL. REV. 490, 498–503 (1996) (finding that free report resulted in an increase in accuracy but a decrease in the quantity of information provided); Ulrich Neisser, *Time Present and Time Past*, in PRACTICAL ASPECTS OF MEMORY: CURRENT RESEARCH AND ISSUES 553 (Michael M. Gruneberg et al. eds., 1988) (finding that in answering open-ended questions, people responded at "a level of generality at which they were not mistaken"). See also Ilan Yaniv & Dean P. Foster, *Precision and Accuracy of Judgmental Estimation*, 10 J. BEHAV. DECISION MAKING 21 (1997).

¹⁶¹ See Fisher, *supra* note 147, at 741 (reviewing studies).

¹⁶² Asher Koriat & Morris Goldsmith, *Memory in Naturalistic and Laboratory Contexts: Distinguishing the Accuracy-Oriented and Quantity-Oriented Approaches to Memory Assessment*, 123 J. EXPERIMENTAL PSYCHOL.: GENERAL 297, 307 (1994) (finding that incentivising accuracy resulted in a greater proportion of accurate answers, but a decrease in the quantity of answers provided). See also Koriat & Goldsmith, *supra* note 160, at 499; Goldsmith et al., *supra* note 160, at 82–86.

¹⁶³ Kathy Pezdek et al., *Interviewing Witnesses: The Effect of Forced Confabulation on Event Memory*, 31 LAW & HUM. BEHAV. 463 (2007).

¹⁶⁴ *Id.* See also Jennifer K. Ackil & Maria S. Zaragoza, *Memorial Consequences of Forced Confabulation: Age Differences in Susceptibility to False Memories*, 34 DEVELOPMENTAL PSYCHOL. 1358 (1998); Reid Hastie et al., *Eyewitness Testimony: The Dangers of Guessing*, 19 JURIMETRICS J. 1 (1978); Maria S. Zaragota et al., *Interviewing Witnesses: Forced Confabulation and Confirmatory Feedback Increase False Memories*, 12 PSYCHOL. SCI. 473 (2001).

potential for decreased accuracy.

By using open-ended questions and encouraging the interviewee to relay even unrequested information, the interviewer may also be able to minimize retrieval-induced forgetting. Retrieval induced forgetting occurs when "memory quantity for the reviewed items is enhanced, [but] memory quantity for related, non-reviewed items is reduced."¹⁶⁵ For example, in one study, participants were asked to view pictures of two categories of items that had been stolen from two houses. Participants then answered questions about some of the items from one of the categories. Subsequently, participants were better able to recall the items about which they had been questioned than the other items.¹⁶⁶ Thus, to the extent that focused, detailed questions are limited to specific aspects of the event or situation, they may inhibit memory for other related aspects of the dispute.

In contrast to open-ended questions, asking specific questions early in the interview—such as multiple choice questions or questions asking the interviewee to confirm or disconfirm a statement—can limit the range of information obtained, decrease accuracy, and increase the possibility that information contained in the question will be subsequently "remembered."¹⁶⁷ Leading questions—questions that suggest or presuppose their answers—pose particular problems for memory. In one study, participants were shown a videotape of a car accident and asked to describe what they had seen.¹⁶⁸ When asked about the speed of one of the cars, one group of participants was asked, "About how fast were the cars going when they hit each other?" Other groups of participants were asked the same question, but the word "hit" was

¹⁶⁵ Ainat Pansky et al., *Eyewitness Recall and Testimony*, in PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 93, 108 (Neil Brewer & Kipling D. Williams eds., 2005). See also SCHACTER, *supra* note 56, at 81–82; Elizabeth W. Dunn & Barbara A. Spellman, *Forgetting by Remembering: Stereotype Inhibition Through Rehearsal of Alternative Aspects of Identity*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 420 (2003); Fisher, *supra* note 147, at 748.

¹⁶⁶ Malcolm MacLeod, *Retrieval-Induced Forgetting in Eyewitness Memory: Forgetting as a Consequence of Remembering*, 16 APPLIED COGNITIVE PSYCHOL. 135, 139–41 (2002). The items that were in the same category as the items they were questioned about were the least well-remembered. *Id.* See also John S. Shaw III et al., *Retrieval-Induced Forgetting in an Eyewitness-Memory Paradigm*, 2 PSYCHONOMIC BULL. & REV. 249 (1995) (finding similar effects of questioning on memory of photos of the scene where a wallet was lost); MacLeod, *supra*, at 142–45 (finding similar effects for memories for people).

¹⁶⁷ Fisher, *supra* note 147, at 743.

¹⁶⁸ Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585, 585 (1974).

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replaced by one of the following: smashed, collided, bumped, or contacted.¹⁶⁹ Estimates of speed varied depending on the descriptor used.¹⁷⁰ In a follow-up experiment, participants who were asked about the speed of the cars when they "smashed into" each other were more likely to incorrectly remember that they saw broken glass than were participants who were asked about the speed of the cars when they "hit" each other.¹⁷¹ Thus, Jack's use of a cross examination-style in initial interviews seems unlikely to yield the disclosure of full memories and may create mistaken memories, and Jack should certainly avoid asking questions based on faulty or unknown premises.

It is also important for Jack to consider the relationships among and the ordering of the questions he asks. Interviewers often ask questions according to a standard interview protocol or in the order that the questions occur to the interviewer.¹⁷² Instead, the ordering of questions ought to be tied to the interviewee's conception of events. That is, Jack should let Edna and his other clients tell their stories in the way that makes sense to them. Thus, if it makes sense to Edna to tell her story in a non-linear or non-chronological fashion, Jack may have to defer some questions that occur to him until an appropriate point in her narrative. While this approach may result in interviews that last longer than Jack's standard half-hour, the reward will be that Edna and his other clients will be able to provide more detail and potential evidence than Jack otherwise would have obtained. For example, in recounting her history at the company over a number of years, Edna may provide facts that could help Jack prove that her termination was part of a larger discriminatory scheme affecting both Edna and other employees. Or, Edna may reveal ethical improprieties that could lead to a successful separate whistle-blower action against the employer.

¹⁶⁹ *Id.* at 585–86.

¹⁷⁰ *Id.* at 586 (smashed (40.8 mph), collided (39.3 mph), bumped (38.1 mph), hit (34.0 mph), or contacted (31.8 mph)).

¹⁷¹ *Id.* at 587. In another study, participants who viewed a video of a car accident were more likely to report seeing a broken headlight when they were asked whether they saw "the" broken headlight (i.e., implying that there was one) than when they were asked whether they saw "a" broken headlight. Elizabeth F. Loftus & Guido Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 BULL. PSYCHONOMIC SOC'Y 86, 87–88 (1975). Importantly, it is not simply reference to a potential detail that results in these effects. While observers who are asked *leading* questions about an incorrect detail (e.g., Did you see the children getting on the school bus?) are more likely than others to remember the detail (i.e., the school bus), observers who are asked *direct* questions about the same detail (e.g., Did you see a school bus?) are not. Loftus, *supra* note 150, at 569.

¹⁷² Fisher, *supra* note 147, at 734.

What else should Jack do to help his clients remember all that they can? As a general matter, simple encouragement to the interviewee to provide more information does not tend to be helpful and can even impede accuracy.¹⁷³ Thus, rather than just asking Carl towards the end of the interview, "Is there anything else you can recall about your conversations with Henrietta?," there are a number of other useful strategies that Jack might employ to help Carl access his memories. First, the interviewee can be encouraged to focus on the facts. There is evidence that a factual focus results in fewer memory errors and less frequent personal commentary.¹⁷⁴ That is, Jack could move Carl away from his potential emotions such as anger, guilt, or embarrassment, and ask him to recall all that he can of the details of the contract, the job, and any subsequent discussions. Second, interviewees can be encouraged to base their memory decisions on specific recollections, rather than relying on overall familiarity.¹⁷⁵ That is, if Carl simply says, "Henrietta never said anything to me about water problems," Jack could ask Carl to try to remember how many times he spoke with Henrietta, when and where each conversation took place, and what specifically was discussed.

Third, "countless studies have . . . shown that seemingly lost information can be recovered by cues or hints that remind us of how we initially encoded an experience."¹⁷⁶ Thus, attorneys might suggest that the interviewee attempt to "recreate the environmental, cognitive, physiological, and affective states that existed at the time of the original event."¹⁷⁷ Specifically, Jack could ask Carl to think about the time of year and the weather when he did the work for Henrietta Homeowner, where he physically negotiated the contract with Henrietta, and how his business was doing otherwise at the time he negotiated with Henrietta Homeowner. Although these facts would not seem

¹⁷³ *Id.* at 742.

¹⁷⁴ Elizabeth J. Marsh et al., *How Eyewitnesses Talk about Events: Implications for Memory*, 19 APPLIED COGNITIVE PSYCHOL. 531, 541 (2005) (comparing a factual focus to an emotional focus). Though this does not mean that Jack should ignore his clients' emotions.

¹⁷⁵ SCHACTER, *supra* note 56, at 102.

¹⁷⁶ *Id.* at 33. Roediger III & Gallo, *supra* note 139, at 20 ("[T]he encoding specificity principle states that the more a retrieval cue matches . . . the way an experience was initially encoded, the more effective it is in provoking a memory for the experience.").

¹⁷⁷ Fisher, *supra* note 147, at 745–46 (reporting study of scuba divers who learned word lists under water or on land; participants performed better when tested in the same environment). When the experience was traumatic, however, one danger of invoking the original condition is too much heightened arousal. *Id.* at 746.

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to be directly relevant to the situation with Henrietta, they may help trigger relevant memories. Finally, the interviewer can ask the interviewee to approach the memory search in different ways—for example, chronological order and reverse chronological order.¹⁷⁸

Jack should be careful regarding the extent to which he uses documents to potentially aid clients' memories. Certainly documents can be helpful in refreshing memory, but documents can also be incomplete or erroneous. If documents are used too early in the interview, they may actually cause clients to forget or neglect matters they otherwise would have reported. Thus, we suggest that attorneys first question clients without documents, and then go back and question them again using seemingly relevant documents. While this approach may be more time-consuming, it is more likely to produce a more complete set of memories.

Finally, clients can and often should be interviewed on multiple occasions.¹⁷⁹ There are several reasons why multiple interviews might be helpful. First, people sometimes experience "reminiscence"—the ability to remember information in later interviews that they were unable to recall initially.¹⁸⁰ Second, there is evidence that retrieval-induced forgetting¹⁸¹ is transient.¹⁸² Thus, temporarily forgotten information might be recalled in a subsequent interview.¹⁸³ On the other hand, repeating errors (just like rehearsing any information) tends to reinforce them.¹⁸⁴ Thus, because

¹⁷⁸ *Id.* The Cognitive Interview also recommends asking the interviewee to imagine different perspectives on the incident. However, while this approach may result in greater recall, it may also increase inaccuracy and suggestibility. See, e.g., Ayanna K. Thomas & Elizabeth F. Loftus, *Creating Bizarre False Memories Through Imagination*, 30 *MEMORY & COGNITION* 423, 429 (2002).

¹⁷⁹ Repeated interviews may also be useful because clients may change their minds or have new information.

¹⁸⁰ See David G. Payne, *Hyperamnesia and Reminiscence in Recall: A Historical and Empirical Review*, 101 *PSYCHOL. BULL.* 5, 5 (1987). See also Brian H. Bornstein et al., *Repeated Testing in Eyewitness Memory: A Means to Improve Recall of a Negative Emotional Event*, 12 *APPLIED COGNITIVE PSYCHOL.* 119, 128 (1998).

¹⁸¹ See *supra* note 165 and accompanying text.

¹⁸² Malcolm D. MacLeod & C. Neil Macrae, *Gone But Not Forgotten: The Transient Nature of Retrieval-Induced Forgetting*, 12 *PSYCHOL. SCI.* 148, 149 (2001).

¹⁸³ In addition, witnesses who have been pushed to guess in previous interviews will sometimes re-indicate that they do not know a particular detail. See Pezdek et al., *supra* note 163.

¹⁸⁴ Karen J. Mitchell & Maria S. Zaragoza, *Repeated Exposure to Suggestion and False Memory: The Role of Contextual Variability*, 35 *J. MEMORY & LANGUAGE* 246, 253 (1996); Henry L. Roediger III et al., *Misinformation Effects in Recall: Creating False Memories Through Repeated Retrieval*, 35 *J. MEMORY & LANGUAGE* 300, 301 (1996).

repeated interviewing increases the opportunities for suggestion, using high quality interview techniques is paramount.¹⁸⁵

To sum up, if Jack were to apply these insights to his interview with Edna Employee, he might start the interview by asking Edna to discuss the nature of her former job from the time when she first started working for the company, to describe her job responsibilities and how they changed over time, and to describe her supervisors and co-workers and the nature of her relationship with each. While Jack would eventually get to the layoff—and would likely at some point need to ask some pointed questions regarding why Edna felt her selection for the layoff was inappropriate—he would have first allowed Edna to give substantial open-ended detail regarding her perspective on her former position. If Edna prefers to tell her story in a non-linear fashion, Jack should let her take that approach. When asking Edna about the layoff itself, Jack might ask Edna to describe her experience of the layoff, eventually asking for detailed descriptions of any meetings she had regarding the layoff. He can prompt her memories using questions regarding who was present at the meetings and where they took place. After soliciting these memories, Jack might move to more specific questions, minimizing the risk that important details will be neglected and then forgotten. Jack should use documents, such as performance reviews or personnel files, to question Edna only after having permitted her to tell her story.

3. Distinguishing Accurate and Inaccurate Memories

As described above, some of our memories are erroneous. It turns out that people have an impressive ability to remember things incorrectly, and then to be certain that the incorrect memory is accurate. They are not lying, but rather just misremembering. What can attorneys do to distinguish accurate and inaccurate memories? Probably the best solution is to look for confirmation, particularly in contemporaneously prepared written materials or photos. While documents sometimes contain inaccuracies too,¹⁸⁶ confirmation of human recollection by a document may at least decrease the

¹⁸⁵ These suggestions apply to interviews of non-client witnesses as well, though of course the attorney must balance the time that would be needed to conduct multiple interviews versus the likely payoff of an additional interview. While it will virtually always be worthwhile to conduct multiple interviews of a critical potential witness like one's own client, it may not always be necessary to conduct multiple interviews of less critical potential witnesses.

¹⁸⁶ See Malcolm Gladwell, *The Picture Problem: Mammography, Air Power, and the Limits of Looking*, THE NEW YORKER, Dec. 13, 2004, at 74 (considering whether we "place too much faith in pictures").

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likelihood of error. Thus, rather than to depend on Edna to provide the date on which she was hired or fired, it is better to look also at the documents which should have been prepared in connection with those events. Similarly, Jack should try to procure plans or photos pertinent to Carl's patio project.

It is tempting and likely common to use a client's degree of confidence in his or her own memories as a guide to whether such memories should be trusted. However, attorneys ought to be cautious about assuming that the confident witness is more reliable than the less-confident witness.¹⁸⁷ Psychological research has demonstrated that confident witnesses are not necessarily more accurate than non-confident witnesses.¹⁸⁸ On the other hand, the relative confidence of a particular interviewee for different pieces of information can be a useful guide. As noted earlier, interviewees are reasonably good judges of the level of detail which they can accurately report.¹⁸⁹ Accordingly, details for which the interviewee is confident do tend to be more accurate than details for which the same interviewee is less confident.¹⁹⁰

¹⁸⁷ Studies show people are inclined to think that confident witnesses are more accurate. See Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817 (1995) (reviewing studies).

¹⁸⁸ Research has demonstrated a generally weak correlation between confidence and accuracy, although the relationship can be stronger under some circumstances. See Penrod & Cutler, *supra* note 187; Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315 (1995); Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INT. 45 (2006).

¹⁸⁹ See *supra* notes 160–61 and accompanying text.

¹⁹⁰ Fisher, *supra* note 147, at 744 (reviewing studies). Brian H. Bornstein & Douglas J. Zickafoose, "I Know I Know It, I Know I Saw It": *The Stability of the Confidence-Accuracy Relationship Across Domains*, 5 J. EXPERIMENTAL PSYCHOL.: APPLIED 76, 181 (1999); Colleen M. Kelley & Lili Sahakyan, *Memory, Monitoring, and Control in the Attainment of Memory Accuracy*, 48 J. MEMORY & LANGUAGE 704 (2003); Koriat & Goldsmith, *supra* note 160; Wayne T. Roberts & Philip A. Higham, *Selecting Accurate Statements from the Cognitive Interview Using Confidence Ratings*, 8 J. EXPERIMENTAL PSYCHOL.: APPLIED 33 (2002). Similar results have been found for witness consistency. That is, across witnesses, witness consistency may be only weakly related to witness accuracy. See Neil Brewer et al., *Beliefs and Data on the Relationship Between Consistency and Accuracy of Eyewitness Testimony*, 13 APPLIED COGNITIVE PSYCHOL. 297 (1999); Ronald P. Fisher & Brian L. Cutler, *The Relation Between Consistency and Accuracy of Eyewitness Testimony*, in PSYCHOLOGY, LAW, AND CRIMINAL JUSTICE: INTERNATIONAL DEVELOPMENTS IN RESEARCH AND PRACTICE 21 (Graham Davies et al. eds., 1995). However, for a particular witness, information that is provided consistently may be more accurate than information for which that witness is

4. Jack's Own Memory

Finally, attorneys themselves are not immune from memory lapses. While some of us have better memories than others, none of us should feel comfortable relying entirely on memory. Thus, we need to be careful in the way we record information obtained from clients, and we also need to make good records of "to do" lists that arise out of client interviews. Jack may tend to rely too heavily on his own memory for client information. Yet, like the rest of us, Jack needs to devise a good system for remembering important things in his work, including in his client interviews. Some attorneys choose to make video or audio tapes of interviews. Such recordings can be quite helpful, but could be undesirable if they diminish client rapport.¹⁹¹ Similarly, careful notetaking can also interrupt the flow of a conversation and make it harder to build rapport. Perhaps Jack will want to ask a paralegal to take notes on his interviews. Or, Jack may want to take some notes and then dictate a detailed file memo right after the interview ends. Jack will need to explore which of these or other options works best.

D. Identifying Liars and Truth Tellers

While there is a lot of folklore regarding how to distinguish liars from truth tellers,¹⁹² it turns out that identifying liars is extremely difficult, even for experts. Although Jack feels comfortable in his own lie-detection abilities, there is no particular cue or set of cues that can reliably be used to identify a lie.¹⁹³ Many of the cues that could be associated with deception can also be associated with other states likely common to legal clients, such as stress. Indeed, across a variety of studies, psychological research has found that people are not adept at distinguishing those who are lying from those who are telling the truth—performing at levels that are little or no

inconsistent. Fisher, *supra* note 147, at 744 (citing Amina Memon & Ray Bull, *Children's Event Memory: The Effects of Interview Technique and Repeated Testing*, paper presented at the meeting of the 23rd International Congress of Applied Psychology (1994)).

¹⁹¹ See *infra* Part III.E.4.

¹⁹² See generally Craig C. Reilly, *The Truth About Lying*, 29 (#4) LITIG. 40 (2003).

¹⁹³ See PAUL EKMAN, TELLING LIES: CLUES TO DECEIT IN THE MARKET PLACE 80 (2001).

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better than chance.¹⁹⁴ Moreover, there is little correlation between our degree of certainty that we have identified a liar and our accuracy.¹⁹⁵ Apparent experts do not tend to perform any better than lay people, though they do tend to be more confident in their determinations.¹⁹⁶ Thus, whereas Jack may believe that he is quite good at figuring out whether clients are lying based on whether they blink, look away, or tap their fingers, he is probably wrong as often as he is right.

A primary reason why people are unable to reliably distinguish lies and truths is that we pay attention to the wrong things. Psychological research has identified a number of cues that people *believe* are related to deception.¹⁹⁷ In particular, people strongly believe that liars avert their gaze, engage in lots of movement (e.g., shifting position, hand movements, foot movements, gestures of illustration), smile, and have more disturbed speech (e.g., hesitation, pauses, slower speech).¹⁹⁸ Many of these anticipated cues are

¹⁹⁴ See generally Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214 (2006) (reporting a meta-analysis of such studies); Bella M. DePaulo et al., *Attentional Determinants of Success at Detecting Deception and Truth*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 273 (1982); Robin S. Edelstein et al., *Detecting Lies in Children and Adults*, 30 LAW & HUM. BEHAV. 1 (2006); Saul M. Kassin et al., *"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211 (2005); Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499 (1999); ALDERT VRIJ, *DETECTING LIES AND DECEIT: THE PSYCHOLOGY OF LYING AND THE IMPLICATIONS FOR PROFESSIONAL PRACTICE* (2000).

¹⁹⁵ Bella M. DePaulo et al., *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOC. PSYCHOL. REV. 346, 346 (1997); Aldert Vrij, *The Impact of Information and Setting on Detection of Deception by Police Detectives*, 18 J. NONVERBAL BEHAV. 117, 130 (1994).

¹⁹⁶ Bella M. DePaulo & Roger L. Pfeifer, *On-the-Job Experience and Skill at Detecting Deception*, 16 J. APPLIED SOC. PSYCHOL. 249, 249 (1986); Kassin et al., *supra* note 194, at 213.

¹⁹⁷ Lay people and practitioners (e.g., police officers, customs officers) have similar beliefs. See Leif A. Strömwall et al., *Practitioners' Beliefs about Deception*, in THE DETECTION OF DECEPTION IN FORENSIC CONTEXTS 229, 233–35 (Pär Anders Granhag & Leif A. Strömwall eds., 2004) (reviewing studies examining beliefs about deception). Criminals actually have less stereotypical beliefs about cues to deception—and are better at detecting lies. *Id.* at 243 (same).

¹⁹⁸ *Id.* at 230–31 (reviewing studies). See also Lucy Akehurst et al., *Lay Persons' and Police Officers' Beliefs Regarding Deceptive Behaviour*, 10 APPLIED COGNITIVE PSYCHOL. 461, 462 (1996); D. Eric Anderson et al., *Beliefs About Cues to Deception: Mindless Stereotypes or Untapped Wisdom?*, 23 J. NONVERBAL BEHAV. 67, 80 (1999); Aldert Vrij & Gün R. Semin, *Lie Experts' Beliefs About Nonverbal Indicators of*

thought to be associated with nervousness. However, many of these believed indicators do not in fact prove reliable in distinguishing liars and truth tellers.¹⁹⁹ Accordingly, it is important that Jack not rely on stereotypes about lying that do not discriminate between liars and truth tellers.

On the other hand, Jack can learn even more from psychology regarding the detection of liars than simply to be careful about his intuitions. There are some dimensions on which liars do tend to differ from those who are telling the truth. Liars tend to offer fewer details,²⁰⁰ give accounts that are less plausible and coherent,²⁰¹ and speak with more vocal tension and higher pitch²⁰²—though the size of these effects can be quite small.²⁰³ Unfortunately, these cues, too, can also be present for other reasons—for example, a high pitch could be a sign of lying or a sign that the person is upset or nervous for some other reason (such as the stress of being questioned or talking about personal information).²⁰⁴ Similarly, lack of detail or coherency can reflect poor memory rather than lying.²⁰⁵ Thus, cues such as these ought to be seen as signals that are worth pursuing further in order to get more information.

In addition, particular attention can be paid to *changes* in the behavior of the particular speaker.²⁰⁶ While one individual's speech and behavior may simply differ from another person's even when they are telling the truth,

Deception, 20 J. NONVERBAL BEHAV. 65, 67 (1996).

¹⁹⁹ For instance, the cue more commonly believed to indicate deception—averted gaze—has not been shown to distinguish liars and truth-tellers. Bella M. DePaulo et al., *Cues to Deception*, 129 PSYCHOL. BULL. 74, 92 (2003) (reporting a meta-analysis of such studies); Strömwall et al., *supra* note 197, at 232 (reviewing studies). Similarly, while people anticipate that liars will display more movement, studies have shown either no differences or that liars made *fewer* movements. DePaulo et al., *supra*, at 92 (discussing meta-analysis). A decrease in movement may result from attempts to compensate for the expectation that they will show an increase in motion or from cognitive effort to carry out the lie. Strömwall et al., *supra* note 197, at 232. In the same way, higher rates of blinking and speech disturbances do not appear to distinguish liars and truth-tellers. DePaulo et al., *supra*, at 93–94 (describing meta-analysis). People also tend to incorrectly associate trustworthiness with attractiveness. See Leslie A. Zebrowitz et al., *"Wide-Eyed" and "Crooked-Faced": Determinants of Perceived and Real Honesty Across the Life Span*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 1258 (1996).

²⁰⁰ DePaulo et al., *supra* note 199, at 91.

²⁰¹ *Id.* at 92.

²⁰² *Id.* at 93–94.

²⁰³ *Id.* at 104.

²⁰⁴ EKMAN, *supra* note 193, at 51, 94, 113.

²⁰⁵ See *supra* Part III.C.

²⁰⁶ EKMAN, *supra* note 193, at 96, 109, 167.

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making distinctions difficult to draw, changes in an individual's behavior may be more predictive and worth following up.²⁰⁷ Thus, just as within-person confidence is more useful in assessing memory than are cross-person comparisons,²⁰⁸ within-person behavior is more useful in identifying lying.

Additional guidance can be provided by examining the handful of people who tend to be better than most at distinguishing liars and truth tellers.²⁰⁹ These lie detection "wizards" have been shown to perform better than others at identifying liars, although they do not perform better than others at identifying truthfulness.²¹⁰ Such wizards' success may be attributable in part to the fact that they are more likely than others to keep an open mind as to whether someone is lying, and avoid committing to a conclusion until they have processed all the information.²¹¹ In considering all the available information, the wizards have been found to pay closer and more sophisticated attention to nonverbal cues and to focus closely on nuances of language.²¹² Relatedly, good lie-detection has been shown to be related to the ability to identify brief expressions of emotion on people's faces.²¹³

All of this is complicated by the fact that much of the time people are not dealing with others who are blatantly lying but instead who hold varying

²⁰⁷ *Id.*

²⁰⁸ See *supra* Part III.C.3.

²⁰⁹ Paul Ekman et al., *A Few Can Catch a Liar*, 10 PSYCHOL. SCI. 263, 265 (1999); Maureen O'Sullivan, *Emotional Intelligence and Deception Detection: Why Most People Can't "Read" Others, But a Few Can*, in APPLICATIONS OF NONVERBAL COMMUNICATION 215 (Ronald E. Riggio & Robert S. Feldman eds., 2005). The effects of training on lie detection ability have been inconsistent. See Ray Bull, *Training to Detect Deception from Behavioural Cues: Attempts and Problems*, in THE DETECTION OF DECEPTION IN FORENSIC CONTEXTS 251 (Pär Anders Granhag & Leif A. Strömwall eds., 2004); Kassir & Fong, *supra* note 194.

²¹⁰ EKMAN, *supra* note 193, at 333.

²¹¹ *Id.* at 245. In contrast, many people begin the analysis with a predisposition that influences judgment—either a truthfulness bias (lay people) or a deception bias (law enforcement officers). See generally Kassir et al., *supra* note 194; Miron Zuckerman et al., *Facial and Vocal Cues of Deception and Honesty*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 378 (1979). This is a form of confirmatory bias. See *supra* notes Part III.A.I. See also Maureen O'Sullivan, *The Fundamental Attribution Error in Detecting Deception: The Boy-Who-Cried-Wolf Effect*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1316, 1317 (2003); Miron Zuckerman et al., *Anchoring in the Detection of Deception and Leakage*, 47 J. PERSONALITY & SOC. PSYCHOL. 301, 302 (1984).

²¹² O'Sullivan, *supra* note 209, at 244.

²¹³ Mark G. Frank & Paul Ekman, *The Ability to Detect Deceit Generalizes Across Different Types of High-Stake Lies*, 72 J. PERSONALITY & SOC. PSYCHOL. 1429, 1430 (1997).

versions of reality.

Telling the whole truth and nothing but the truth is rarely possible or desirable. All self-presentations are edited. The question is one of whether the editing crosses the line from the honest highlighting of aspects of identity that are most relevant in the ongoing situation to a dishonest attempt to mislead.²¹⁴

Probably the most common way in which clients lie to their attorneys is that they fail to inform the attorney of particular details.²¹⁵ Such omissions may be deliberate. Notwithstanding attorneys' incantation of the attorney-client privilege and urging their clients to be forthright, some clients may believe that their attorneys will represent them more effectively if they are not aware of certain skeletons in the clients' closets.²¹⁶ Clients may also fear that if they disclose damaging information to the attorney, the attorney will feel compelled to disclose it to the opposing side or to a finder of fact.²¹⁷ In other instances, such omissions may simply be a function of misconstrual or a need to be viewed positively.²¹⁸ If outright lies are difficult to discern, surely it is even more difficult to discern nuances of shading, positive spin, or editing.

Thus, Jack should be aware that clients may lie, recognize his own limitations in detecting lies, keep an open mind, and be prepared to try to check clients' veracity. A few helpful measures can include using documents to confirm or contradict clients' accounts, interviewing multiple or married

²¹⁴ DePaulo et al., *supra* note 199, at 105.

²¹⁵ KRIEGER & NEUMAN, *supra* note 8, at 102–04 (discussing semiconscious fudging and conscious lying).

²¹⁶ See generally BINDER ET AL., *supra* note 8, at 19–21 (noting that clients tend to withhold information they deem threatening either to their self-esteem or to their likelihood of success in the case).

²¹⁷ This fear is not irrational. Despite the protections of the attorney-client privilege, attorneys may often be compelled by rules of procedure and professional responsibility to provide damaging information to opposing counsel. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) (providing, in text and comments that the lawyer may disclose information relating to the representation of client where the disclosure "is impliedly authorized in order to carry out the representation" or for other reasons such as "to prevent reasonably certain death or substantial bodily harm," or "to comply with other law or a court order").

²¹⁸ See *supra* Part III.C.1. See also Douglas P. Crowne & David Marlowe, *A New Scale of Social Desirability Independent of Psychopathology*, 24 J. CONSULTING PSYCHOL. 349 (1960); Theresa J. DeMaio, *Social Desirability and Survey Measurement: A Review*, in SURVEYING SUBJECTIVE PHENOMENA 257, 276 (Charles F. Turner & Elizabeth Martin eds., 1984).

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clients—such as the Kiddos—separately, and interviewing other witnesses who might be in a position to serve as a check on the clients' stories.

E. *Communication*²¹⁹

If Jack can communicate well with his clients, he will build better rapport with those clients and will be better able to both obtain information from and provide information and advice to those clients. When we first met Jack, we learned that he wished he could communicate with his clients directly, as if he and they were both computers that could be networked. Given that Jack's wish for networking is not going to be granted in the foreseeable future, Jack will need to think beyond verbal exchanges. Whereas computers communicate exclusively using strings of numbers, humans rely on body language and environmental settings to assist their verbal expressions. Jack will need to understand that both good communication and the perception of good communication are critically important to being an effective interviewer and counselor.

Ideally, Jack should master quite a few aspects of communication. To obtain good information from his clients, Jack will need to be a good listener and to understand conversational norms. Jack will also need to understand the role that perspective taking and the development of empathy can play in facilitating communication. Whereas Jack has never seen a need to be particularly empathetic, the relevant psychology suggests that the empathetic lawyer can both learn more from and provide more information to his client, as well as build better rapport and trust. Improved rapport, in turn, is beneficial not only for retaining client relationships and bringing in more business, but also because it will aid Jack in obtaining information from and providing information to his clients. In communicating with his clients, Jack should also pay attention to what psychologists know about how people learn. Providing clients information in ways that are consistent with the ways in which they learn can improve Jack's ability to counsel. Finally, Jack ought to pay attention to the physical setting in which client communication occurs, using the environment to promote communication.

²¹⁹ See generally Robert M. Krauss & Ezequiel Morsella, *Communication and Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 131 (Morton Deutsch & Peter T. Coleman eds., 2000) (discussing the relationship between communication and conflict).

1. *Listening*

It is important, psychologically, for attorneys to listen carefully and also to demonstrate to their clients that they are listening carefully.²²⁰ At a basic level, if the attorney does not pay attention to the information that the client is providing, she is likely to miss important data.²²¹ Moreover, clients, like all other people, like to feel that someone is listening when they speak.²²²

In order to both listen effectively and appear to clients to be listening effectively, lawyers should typically let their clients tell their initial stories without interruptions,²²³ follow up their accounts with clarifying questions,²²⁴ and then provide feedback and legal information that reflects that the attorney was listening carefully.²²⁵ Studies of interviewers, including lawyers,²²⁶ police interviewers, and physicians, have found that interviewers are prone to interrupt early and often.²²⁷ Research shows that interjecting a

²²⁰ An attorney who listens well but appears not to be listening will not be as effective as the attorney who is, more obviously, paying close attention to her client. The appearance of good listening is also important to the building of rapport and trust with the client. See *infra* notes 263–80 and accompanying text.

²²¹ See *supra* Part III.A.1.

²²² Lawrence J. Vilardo, *Communicating with Clients*, 27 (#3) LITIGATION 45, 45 (2001) ("Clients come to lawyers to be heard. In fact, when you deal with your clients, listening is the more important half of the communication equation."); Jenny B. Davis, *What I Like About my Lawyer*, 89 A.B.A. J. 33, 36 (2003) (noting that being an excellent listener is one of various qualities clients appreciate in their lawyers).

²²³ Of course, some clients may ramble so extensively that there is no choice but to interrupt.

²²⁴ See, e.g., BINDER ET AL., *supra* note 8, at 91–93 (noting that the initial stage of the interview, designated by the authors as "preliminary problem identification," should typically begin with open-end questions); KRIEGER & NEUMANN, JR., *supra* note 8, at 87 (explaining that clients should be given chance to provide their initial story before attorney jumps in with numerous questions).

²²⁵ Vilardo, *supra* note 222, at 46.

²²⁶ One study showed that lawyers interrupt their clients more often than people interrupt one another in the course of normal conversation. Bryna Bogoch & Brenda Danet, *Challenge and Control in Lawyer-Client Interaction: A Case Study in an Israeli Legal Aid Office*, 4 TEXT 249, 254 (1984). Another study, of legal services lawyers, showed they interrupted clients ten times during the course of the interview, on average once every three minutes. Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 605 (1979).

²²⁷ See Fisher, *supra* note 147, at 734–36 (describing research on police interviews); Howard B. Beckman & Richard M. Frankel, *The Effect of Physician Behavior on the*

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large number of specific questions can make it difficult for the interviewer to listen to the answers provided by the interviewee. "Directing those limited mental resources to formulating many questions—rather than listening intently to the witness's narrative response to open-ended questions—ought to increase the difficulty of understanding or notating the witness's responses."²²⁸ In addition, as we have already discussed, psychological research has documented the benefits to memory that come from listening to interviewees and not interrupting their answers to questions.²²⁹

In addition, attorneys need to be conscious of messages they may inadvertently convey to their clients that signal a lack of attention to clients' answers. Studies have shown that people have a tendency to convey more detail in their answers when the listener is attentive and not distracted.²³⁰ Thus, if Jack allows himself to tap his pen or feet nervously, frustrated that his client seems to be rambling, the client may well pick up on a sense of boredom or frustration and this may cause the client to stop communicating thoroughly. Instead, Jack should use his face, words, and body to show that he is listening carefully, for example by leaning forward and using supporting phrases (e.g., "uh huh").²³¹

Thus, when Jack begins to interview Agnes Ageout about her estate planning, he needs to be cognizant that Agnes may well not be comfortable speaking directly about her needs and wishes. Agnes may, for example, be embarrassed by the fact that she wants to leave all her assets to Lenny, rather than to her children and grandchildren. Agnes may want to speak explicitly

Collection of Data, 101 ANNALS INTERNAL MED. 692, 694 (1984) (describing research on physicians); M. Kim Marvel et al., *Soliciting the Patient's Agenda: Have We Improved?*, 281 JAMA 283, 285 (1999) (describing research on physicians). See generally DEBRA L. Roter & Judith A. Hall, DOCTORS TALKING WITH PATIENTS/PATIENTS TALKING WITH DOCTORS: IMPROVING COMMUNICATION IN MEDICAL VISITS (2d ed. 2006). One study found that physicians interrupted patients, on average, only 18 seconds after they began their answer. Beckman & Frankel, *supra*, at 693–94 (also finding that in only 23% of visits did patients complete their statement of complaint and that only 1 out of 52 interrupted statements was subsequently completed by the patient).

²²⁸ Powell et al., *supra* note 157, at 20. See *supra* Part III.A.1.

²²⁹ See *supra* Part III.C.2. See also Monisha Pasupathi et al., *How What We Tell Becomes What We Know: Listener Effects on Speakers' Long-Term Memory for Events*, 26 DISCOURSE PROCESSES 1, 10–13 (1998).

²³⁰ *Id.*

²³¹ We recognize that good listening is not many attorneys' forte. One old saw states: "You can always tell a barber by the way he parts his hair; You can always tell a dentist when you're in the dentists' chair; And even a musician—you can tell him by his touch; You can always tell a lawyer, but you cannot tell him much." Anonymous, LIFETIME SPEAKER'S ENCYCLOPEDIA (Jacob M. Braude ed., 1962).

about some of her fears, such as that Lenny might decide to break up with her, that her health might decline in unpleasant ways, or that her children or grandchildren might try to challenge her will. To listen well in such a context, Jack will need to focus all his attention on Agnes. He will certainly not want to be multitasking or permitting unnecessary interruptions relating to other cases. In addition, Jack will need to focus on all the verbal and visual cues that Agnes may provide. Jack needs to hear changes or hesitations in Agnes's voice so that he can follow up with additional questions or raise additional issues. If Agnes's facial expression or posture reveals that she is distressed or concerned about a particular subject, Jack needs to be able to perceive and understand those forms of communication so that he can respond appropriately. If Jack senses that Agnes is hesitant, confused, or embarrassed, he needs to try to address her concerns. Rather than leave important issues unaddressed, Jack ought to raise them, at least to ask Agnes whether she wishes to discuss them further.

2. *Conversational Norms*

Interviews deviate from typical conversations in ways that have implications for interviewers' ability to elicit information from interviewees.²³² First, in the context of an interview, a client will usually be expected to report information at a higher level of detail than would be expected in a typical conversation.²³³ Whereas Edna might simply tell her friends, "I am sure I was discriminated against," Jack will need her to provide details as to when, where, and how she believes she was mistreated. If Edna does not go into this level of detail voluntarily—and most clients do not—Jack will eventually need to ask specific and detailed follow-up questions.

Second, the norms of everyday conversation posit that information provided by a speaker should contribute to the ongoing conversation—that it should not be information that the questioner already has.²³⁴ Accordingly, "[u]nless the person asked has reason to believe that the questioner did not understand the answer given in response to the first question, he or she is likely to interpret the second question as a request for new information" and will provide an answer that differs in some way from the answer to the

²³² See generally NORBERT SCHWARTZ, COGNITION AND COMMUNICATION: JUDGMENTAL BIASES, RESEARCH METHODS, AND THE LOGIC OF CONVERSATION 63 (1996) (discussing conversational norms).

²³³ Powell et al., *supra* note 157, at 16. See *supra* Part III.C.

²³⁴ SCHWARTZ, *supra* note 232, at 63. While some persons do, of course, violate this norm, society tends to look upon such persons as blabbermouths.

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previous iteration of the question.²³⁵ Thus, because attorneys often need their clients to violate this conversational norm, by either repeating themselves—so the attorney can verify her understanding—or providing additional detail, attorneys need to explain clearly what they need from their client.

Specifically, at the beginning of an interview Jack ought to inform his clients that he will often need very detailed responses, and to encourage his clients not to edit their responses, but rather to provide complete answers:²³⁶

Mrs. Kiddo, I know it will be very painful for you to discuss your son's injuries. But I want to warn you up front that I will need to ask you a lot of questions and sometimes even seemingly ask you to repeat yourself. In order for me to fully understand what happened, and in order for me to be fully prepared for everything the other side may throw at us, I will need to ask you to go into lots of detail and sometimes will have you tell me the same thing over again from a different angle. As you are telling me the story, try not to leave anything out, as I would like to hear about everything that is possibly related to this incident.

Similarly, when Jack sees the need as the interview progresses to repeat questions or revisit topics, he should clearly communicate his purposes and clarify that the repetition should not signal the need to change an answer or to speculate. In other words, Jack needs to be very transparent in the way that he conducts the interview:

Mr. Kiddo, I know that you have already told me the gist of what happened to your son, Kyle. But now I would like for you to go back and tell me again everything you can remember of the day when Kyle swallowed those magnetic balls. This time try to describe the events in chronological order. This will help me to make sure I understand everything that happened and that I don't miss anything important.

3. Perspective Taking and Empathy

Perspective taking—the ability to take the perspective of other people and imagine their experiences, perceptions, and feelings—may be particularly important to the lawyer-client relationship. Importantly, people who take the perspective of another person have been shown to experience

²³⁵ *Id.* at 64.

²³⁶ The interviewer should then give the interviewee sufficient time to do so. *See also* Powell et al., *supra* note 157, at 17 (noting the importance of conveying to interviewees the need to report all information).

greater empathy towards that other—perceiving and sharing in the other's emotions.²³⁷ In addition, those who take the perspective of others engage in less stereotyping,²³⁸ make attributions about the other that are closer to the types of attributions they would make about themselves (i.e., giving more consideration to situational factors),²³⁹ perceive the interests²⁴⁰ and intentions²⁴¹ of the other more accurately,²⁴² and make less self-serving judgments of fairness.²⁴³ Thus, striving to take the perspective of another

²³⁷ See MARK H. DAVIS, *EMPATHY: A SOCIAL PSYCHOLOGICAL APPROACH* 17 (1996). See also C. DANIEL BATSON, *THE ALTRUISM QUESTION: TOWARD A SOCIAL-PSYCHOLOGICAL ANSWER* 83–86 (1991). Empathy, broadly conceived, can include a variety of "constructs having to do with the responses of one individual to the experiences of another," including their affective, cognitive, and behavioral responses. DAVIS, *supra*, at 12. Professor Robert Mnookin and his co-authors emphasize the behavioral aspect of empathy: "For purposes of negotiation we define *empathy* as the process of demonstrating an accurate, nonjudgmental understanding of the other side's needs, interests, and perspective." ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 46 (2000). According to Mnookin, a good negotiator manages the tension between empathy and assertiveness, listening well and speaking persuasively. *Id.* at 68. "Sympathy," in contrast, includes "heightened awareness of the suffering of another person as something to be alleviated." Lauren Wispé, *The Distinction Between Sympathy and Empathy: To Call Forth a Concept, a Word is Needed*, 50 J. PERSONALITY & SOC. PSYCHOL. 314, 318 (1986).

²³⁸ Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78 J. PERSONALITY & SOC. PSYCHOL. 708, 721 (2000). See also John F. Dovidio et al., *Perspective and Prejudice: Antecedents and Mediating Mechanisms*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1537, 1538–43 (2004).

²³⁹ Dennis T. Regan & Judith Totten, *Empathy and Attribution: Turning Observers Into Actors*, 32 J. PERSONALITY & SOC. PSYCHOL. 850, 854 (1975); Storms, *supra* note 84, at 169. See also Mark H. Davis et al., *Effect of Perspective Taking on the Cognitive Representation of Persons: A Merging of Self and Other*, 70 J. PERSONALITY & SOC. PSYCHOL. 713, 715–18 (1996).

²⁴⁰ Nancy Eisenberg et al., *The Development of Empathic Accuracy*, in *EMPATHIC ACCURACY* 73, 97–99 (William Ickes ed., 1997).

²⁴¹ See Margaret A. Neale & Max H. Bazerman, *The Role of Perspective-Taking Ability in Negotiating Under Different Forms of Arbitration*, 36 INDUS. & LAB. REL. REV. 378, 380 (1983).

²⁴² See William M. Bernstein & Mark H. Davis, *Perspective-Taking, Self-Consciousness, and Accuracy in Person Perception*, 3 BASIC & APPLIED SOC. PSYCHOL. 1, 5–9 (1982) (finding that perspective taking is associated with accuracy in person perception).

²⁴³ Aimee Drolet et al., *Thinking of Others: How Perspective Taking Changes Negotiators' Aspirations and Fairness Perceptions as a Function of Negotiator Relationships*, 20 BASIC & APPLIED SOC. PSYCHOL. 23, 28 (1998) (finding effect of

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person may be important for lawyers. If Jack can learn to empathize with his clients, he will be better able to understand how their desires and concerns differ from his own. For example, whereas Jack is a logical person who believes that his primary goal in most disputes would be to maximize his monetary well-being, many of his clients may well approach disputes differently.²⁴⁴ They may feel a wide variety of emotions relating to their situation—including anger, guilt, embarrassment, or fear—and may be interested in pursuing a wide variety of goals. For example, as Agnes approaches her estate-planning issues, she may be more interested in her relationships with Lenny and her children and in her own emotions about her impending death than she is on maximizing her economic well-being. The Kiddos may want sufficient money to be able to care for Kyle adequately, but beyond that, they may be more interested in obtaining a public statement that the magnetic ball manufacturer was at fault, clearing their own names, and absolving their own guilt than in obtaining additional money. If Jack can come to understand and empathize with these inclinations, he will be able to communicate with his clients more successfully, establish better rapport, and represent them more effectively in future settlement negotiations.²⁴⁵

People in more powerful roles, however, tend to be less likely to take another's perspective. Recent research has found that people with power are less likely to "adopt another person's visual perspective," are less likely to "take into account that other people [do] not possess their privileged knowledge," and are less accurate in identifying emotions in others.²⁴⁶ Thus,

perspective taking when relationship between negotiators was positive, but not when it was negative). See *supra* Part III.B.3.

²⁴⁴ See Relis, *supra* note 14, at 382–83 (emphasizing differences between plaintiffs' actual goals and the goals that are imputed to them by attorneys); Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2677 (1995) ("[P]eople and entities in disputes may have a wide variety of interests (of which legal principles may be one class) and may decide that, in any given case, social, psychological, economic, political, moral, or religious principles should govern the resolution of their dispute."); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 302–06 (1999) (detailing a number of nonmonetary goals that parties may have that "may reflect a rationality that is broader than the mere maximization of wealth").

²⁴⁵ Empathy in physicians is associated with trust in them by their patients, treatment compliance, and overall satisfaction. See, e.g., Jo Silvester et al., "Trust Me . . .": Psychological and Behavioral Predictors of Perceived Physician Empathy, 92 J. APP. PSYCHOL. 519, 519 (2007) (reviewing studies of empathy and trust in physicians).

²⁴⁶ Adam Galinsky et al., *Power and Perspectives Not Taken*, 17 PSYCHOL. SCI. 1068, 1072 (2006).

attorneys—who occupy a position of power relative to their clients—may need to pay particular attention to the perspective of their clients.²⁴⁷

Assuming that Jack wants to do a better job in taking his clients' perspectives and to be more empathetic, how could he achieve that result? Research has shown that when people value the welfare of another person, they are more likely to take that person's perspective and to experience empathic concern for that person's situation.²⁴⁸ In addition, Jack may want to talk less and listen more.²⁴⁹ Studies in the medical context have shown "empathy ratings were positively associated with physicians' use of open and reassuring communication styles, and negatively associated with a controlling communication style."²⁵⁰ Jack can also pay attention to his clients' nonverbal messages—watching for cues to their discomfort and emotions.²⁵¹ While lawyers may not want to try to become close friends with their clients,²⁵² or to allow lawyering to drift into therapy,²⁵³ they do need to

²⁴⁷ Receiving feedback about how the accuracy of one's empathic inferences improves future empathic accuracy. See William Ickes et al., *Studying Empathic Accuracy in a Clinically Relevant Context*, in EMPATHIC ACCURACY 282, 298–300 (William Ickes ed., 1997).

²⁴⁸ See, e.g., C. Daniel Batson et al., *An Additional Antecedent of Empathic Concern: Valuing the Welfare of the Person in Need*, 93 J. PERSONALITY & SOC. PSYCHOL. 65, 72–73 (2007).

²⁴⁹ See *supra* Part III.E.1. See, e.g., Cathy Gillotti et al., *Communicative Competence in the Delivery of Bad News*, 54 SOC. SCI. & MED. 1011, 1018 (2002) (finding that physicians were rated as being more empathetic if they asked fewer closed-ended questions). See also Klea D. Bertakis et al., *The Relationship of Physician Medical Interview Style to Patient Satisfaction*, 32 J. FAMILY PRACTICE 175, 175 (1991); Mary Klein Buller & David B. Buller, *Physicians' Communication Style and Patient Satisfaction*, 28 J. HEALTH & SOC. BEHAV. 375, 384 (1987) (finding that an affiliative communication style was associated with greater patient satisfaction); Silvester et al., *supra* note 245, at 522 (finding that empathy was associated with "discussion of personal topics, fewer missed patient cues, more personal responsibility, and more personal action statements" by the physician as well as with "more positive statements and [discussion of] the medical procedure in more detail").

²⁵⁰ Silvester et al., *supra* note 245, at 523. Open and reassuring communication styles included the use of open-ended questions, positive statements, and statements about procedure; a controlling communication style consisted of behaviors such as interrupting, making summary statements, and closed questions. *Id.*

²⁵¹ See generally Ronald E. Riggio, *Nonverbal Skills and Abilities*, in THE SAGE HANDBOOK OF NONVERBAL COMMUNICATION 79, 81 (Valerie Manusov & Miles L. Patterson eds., 2006) (discussing the importance of skill in nonverbal decoding).

²⁵² The Model Rules explicitly proscribe attorneys from engaging in sexual relationships with their clients and also limit attorneys' opportunities to do unrelated business with their clients. MODEL RULES OF PROF'L CONDUCT R. 1.8(a) & (j). See also

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try to use their ears and eyes to better understand not only what their clients are saying but also what they mean and, sometimes, what they are *not* saying.

It may also be useful for lawyers to try to teach the importance of perspective taking and empathy to their clients. To the extent that clients can come to better understand a seeming adversary's perspective, clients may be able to better understand their likelihood of prevailing in litigation, to devise a mutually acceptable settlement, and to make an informed decision regarding whether it even makes sense to try to litigate a particular dispute. While attorneys cannot, of course, teach an actual class on empathy to their clients, they may want to help their clients imagine how the world might look through the eyes of the seeming adversary. In practice, it may be difficult for attorneys to engage in such discussions with clients. Clients often treasure the idea that their attorney is their advocate who would never see the world through anyone but the clients' eyes.²⁵⁴ However, to be truly effective in representing their clients' interests, attorneys must at times try to impart empathy.

4. *Trust and Rapport*

Trust is central to the attorney-client relationship. To trust is to "accept vulnerability based on positive expectations of the intentions or behavior of another."²⁵⁵ Clients, who are often in a vulnerable position, trust their attorney when they rely on the attorney to act in ways that are consistent with the clients' well-being—expecting both that the attorney will act with fidelity

Howard W. Brill, *Sex and the Client: Ten Reasons to Say "No!"*, 33 SANTA CLARA L. REV. 651 (1993); Robert J. Condlin, *"What's Love Got to Do With It?" "It's Not Like They're Your Friends for Christ's Sake": The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211 (2003).

²⁵³ See BASTRESS & HARBAUGH, *supra* note 8, at 20–21 (distinguishing the roles of lawyers and psychotherapists and noting that while some skills may overlap, lawyers should not be in the business of probing their clients' psyche or otherwise providing psychological counseling). See also Gantt II, *supra* note 45, at 386–97 (noting that counseling that too closely resembles therapy can expose lawyers to ethical risks).

²⁵⁴ See generally William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992).

²⁵⁵ Denise M. Rousseau et al., *Not So Different After All: A Cross-Discipline View of Trust*, 23 ACAD. MGMT. REV. 393, 395 (1998). See generally Roy J. Lewicki & Carolyn Wiethoff, *Trust, Trust Development, and Trust Repair*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 86 (Morton Deutsch & Peter T. Coleman eds., 2000) (discussing trust and conflict).

to their interests and will act competently in doing so.²⁵⁶

Trust can further the attorney-client relationship by improving communication between attorney and client—promoting disclosure of important information by the client and facilitating the counseling process. Clients want to believe that their lawyer is their ally and advocate—and may hesitate to provide full information if they don't feel supported.²⁵⁷ In contrast, people tend to be more willing to share more information (particularly sensitive or personal information) with those whom they trust.²⁵⁸ In addition, if clients trust their attorneys, discussions regarding settlement and other options will be far more successful. Clients who trust their attorneys may be more willing to consider and follow the attorneys' advice.²⁵⁹ It is natural that when an attorney begins to discuss settlement, the client may feel let down or even abandoned. The lawyer who the client had seen as her knight in shining armor is now urging that the client's position may not be so strong after all. Is the lawyer perhaps looking out for her own interests rather than those of the client?²⁶⁰ However, if the client has real trust in her attorney, she is less

²⁵⁶ See Mark Hall et al., *Trust in Physicians and Medical Institutions: What Is It, Can It Be Measured, and Does It Matter?*, 79 MILBANK Q. 613, 620–24 (2001). Distrust, which can exist simultaneously with trust, involves negative expectations about the behavior or intentions of the other. See *id.* at 618–19. See also Roy J. Lewicki et al., *Models of Interpersonal Trust Development: Theoretical Approaches, Empirical Evidence, and Future Directions*, 32 J. MGMT. 991, 1002 (2006).

²⁵⁷ For example, clients may hesitate to provide personal information regarding finances, relationships, misconduct, and similar matters if they do not trust and have good rapport with their attorney.

²⁵⁸ John K. Butler, Jr., *Trust Expectations, Information Sharing, Climate of Trust, and Negotiation Effectiveness and Efficiency*, 24 GROUP & ORG. MGMT. 217, 227 (1999); See Hall et al., *supra* note 256, at 614; Lewicki et al., *supra* note 256, at 1004.

²⁵⁹ See Janet A. Snizek & Lyn M. Van Swol, *Trust, Confidence, and Expertise in a Judge-Advisor System*, 84 ORG. BEHAV. & HUM. DECISION PROCESSES 288, 297–98 (2001) (finding that the more inexperienced decisionmakers trusted their expert advisors, the more likely they were to make decisions consistent with the advisors' advice and the more confident they were in their decisions). See also Marcus T. Boccaccini et al., *Development and Effects of Client Trust in Criminal Defense Attorneys: Preliminary Examination of the Congruence Model of Trust Development*, 22 BEHAV. SCI. & L. 197, 206–07 (2004) (finding that incarcerated criminal defendants who trusted their attorneys were more satisfied with their attorneys and their sentences); David H. Thom et al., *Patient Trust in the Physician: Relationship to Patient Requests*, 19 FAM. PRAC. 476, 481 (2002) (finding that trust in physician was associated with intent to follow physician's advice); Felicia Trachtenberg et al., *How Patients' Trust Relates to their Involvement in Medical Care*, 54 J. FAMILY PRAC. 344 (2005) (finding that trust was associated with following physician recommendations).

²⁶⁰ Clients may sometimes suspect that lawyers recommend a particular course of

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likely to feel that the attorney misled her at any point.

Trust can be facilitated in a variety of ways. As an initial matter, existing reputations and institutional structures—such as the requirements and norms of professional responsibility—can lay a foundation for a relationship of trust.²⁶¹ While lawyers often inform their clients that their communications are covered by the attorney-client privilege, urging clients to be forthcoming on this basis, merely informing clients of the existence of such a privilege may not be enough to create real trust.²⁶² Beyond this, however, trust is influenced by patterns of communication and interpersonal interaction. Moreover, people can build trust through the ways in which they communicate openness and concern for the other's needs.²⁶³ Through his words, conduct, eye contact, and body language, Jack needs to try to communicate a genuine concern for his clients. Communicating in such a

action because they are friends with the opposing attorney, afraid to take a case to court, afraid of hurting their own relationship with the opposing client, or seeking to aggrandize their own reputation—perhaps at the expense of the client. For a general discussion of possible attorney-client conflicts of interest and their potential impact on settlement, see Sternlight, *supra* note 244, at 316–31.

²⁶¹ See generally Debra Meyerson et al., *Swift Trust and Temporary Groups*, in TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH 166 (Roderick M. Kramer & Tom R. Tyler eds., 1996) (factors include role expectations, professional standards, reputations); Susan P. Shapiro, *The Social Control of Impersonal Trust*, 93 AM. J. SOC. 623, 626–29 (1987) (discussing institutions and structures that allow for trust); Ellen M. Whitener et al., *Managers as Initiators of Trust: An Exchange Relationship Framework for Understanding Managerial Trustworthy Behavior*, 23 ACAD. MGMT. REV. 513, 516–18 (1998) (noting trust built on routines or the normalcy of encounter—as in the case of banks).

²⁶² We are not aware of any empirical studies on assurances of confidentiality in legal counseling. In the context of survey research, studies have found that assurances of confidentiality can result in more disclosure of sensitive topics (but not of other information). See Eleanor Singer et al., *Confidentiality Assurances and Response: A Quantitative Review of the Experimental Literature*, 59 PUB. OPINION Q. 66 (1995). However, there is some evidence that strong assurances can actually make confidentiality concerns salient, rather than establish trust. See Eleanor Singer et al., *Confidentiality Assurances in Surveys: Reassurance or Threat?*, 4 INT'L J. PUB. OPINION RES. 256 (1992).

²⁶³ Michael Morris et al., *Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 89, 90 (2002) (discussing communicating openness (handshakes, open-palmed gestures, disclosures of personal non-task-relevant information) and interest (smiles, nodding, questions about the other)) (citing Michael Morris & Dacher Keltner, *How Emotions Work: An Analysis of the Social Functions of Emotional Expression in Negotiations*, 22 REV. ORGANIZATIONAL BEHAV. 1 (2000)); Rousseau et al., *supra* note 255, at 397 (discussing openness and concern); Whitener et al., *supra* note 261, at 516–18 (discussing demonstrating concern).

way as to provide information that is accurate and to provide explanations for actions also contributes to a sense of trust.²⁶⁴ In particular, advisor explanation of and elaboration on the information provided has been shown to be associated with trust.²⁶⁵ In addition to communication, trust is influenced by the degree to which a person acts consistently and predictably, competently, and with integrity and honesty.²⁶⁶ Moreover, shared control and participation in decisionmaking tends to foster a sense of trust.²⁶⁷ In particular, psychological research has found that criminal defendants whose actual participation in their cases was congruent with their level of desired participation were more trusting of their attorneys.²⁶⁸ In short, Jack can build his clients' trust in him by spending ample time on the initial interview, responding promptly to subsequent client queries, sharing with his clients some of his thinking about the pros and cons of various courses of action, and allowing clients to participate in decisions regarding their case.²⁶⁹

Rapport in a relationship or interaction is closely related to trust and has been conceptualized as having three interrelated characteristics: 1) mutual attentiveness—where both participants attend to and are involved with each other; 2) "positivity"—a reciprocal sense of consideration for each other; and 3) "coordination"—a sense of responsiveness to each other or of being "in sync."²⁷⁰ Some have argued that "[b]uilding rapport is considered so important that it is listed as a discrete training phase in most prominent

²⁶⁴ Whitener et al., *supra* note 261, at 517.

²⁶⁵ Sniezek & Van Swol, *supra* note 259, at 297.

²⁶⁶ Rousseau et al., *supra* note 255, at 397 (including factors like competence and reliability); Whitener et al., *supra* note 261, at 516–18 (including factors like consistency and integrity).

²⁶⁷ Whitener et al., *supra* note 261, at 516–18 (1998) (sharing and delegating control).

²⁶⁸ Boccaccini et al., *supra* note 259, at 210 (finding that those who did not desire to participate and those who both desired to and were allowed to participate had more trust in their attorneys than those who desired to but were not allowed to participate).

²⁶⁹ Rule 1.2 of the ABA Rules of Professional Conduct requires attorneys to abide by a client's decisions concerning the "objectives of representation" and to consult with the client as to "the means by which they are pursued." MODEL RULES OF PROF'L CONDUCT R. 1.2. We suggest that this is wise from a psychological standpoint as well.

²⁷⁰ Linda Tickle-Degnen & Robert Rosenthal, *The Nature of Rapport and Its Nonverbal Correlates*, 1 PSYCHOL. INQUIRY 285, 286 (1990). See also Aimee L. Drolet & Michael W. Morris, *Rapport in Conflict Resolution: Accounting for How Face-to-Face Contact Fosters Mutual Cooperation in Mixed-Motive Conflicts*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 26, 27 (2000) (characterizing rapport as a "state of mutual positivity and interest that arises through the convergence of nonverbal expressive behavior in an interaction").

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investigative interview protocols."²⁷¹ Indeed, psychological research has found that rapport can result in increased trust²⁷² and more cooperative interactions.²⁷³ More generally, people tend to remember and disclose greater amounts of information when they feel comfortable and at ease.²⁷⁴ People may also be more forthcoming as a sense of rapport contributes to feeling "less constrained to present [them]selves continuously in a favorable or pleasant light."²⁷⁵ Finally, people may be more willing to consider and comply with professional advice when they have a trusting and comfortable relationship with their advisor.²⁷⁶

A number of nonverbal behaviors have been found to contribute to a sense of rapport. In particular, a variety of behaviors related to posture and orientation—such as directly facing the other person, leaning forward, and not crossing one's arms—are associated with assessments of rapport in interpersonal interactions.²⁷⁷ Similarly, other non-verbal behaviors that signal attentiveness and coordination—such as smiling and nodding—are also related to the development of rapport.²⁷⁸ Studies have also found that feelings of rapport are facilitated when people spend some time getting to know each other—engaging in small talk, "schmoozing,"²⁷⁹ or discussing personal or shared interests can provide the opportunity to develop a connection.²⁸⁰

²⁷¹ Powell et al., *supra* note 157, at 14.

²⁷² Leigh Thompson & Janice Nadler, *Negotiating Via Information Technology: Theory and Applications*, 58 J. SOC. ISSUES 109, 111 (2002) (describing Aimee L. Drolet & Michael W. Morris, *Communication Media and Interpersonal Trust in Conflicts: The Role of Rapport and Synchrony on Nonverbal Behavior*, unpublished manuscript (1995)).

²⁷³ Drolet & Morris, *supra* note 270, at 42–44 (finding rapport associated with more cooperation overall and more coordination on mutual cooperation in a prisoner's dilemma).

²⁷⁴ Powell et al., *supra* note 157, at 13–14. As a general matter, stress has been found to inhibit memory. See, e.g., Dominique J.-F. de Quervain et al., *Acute Cortisone Administration Impairs Retrieval of Long-Term Declarative Memory in Humans*, 3 NATURE NEUROSCIENCE 313, 313 (2000) (finding that stress hormones impede memory).

²⁷⁵ Tickle-Degnen & Rosenthal, *supra* note 270, at 287.

²⁷⁶ See generally ROTER & HALL, *supra* note 227 (reviewing studies).

²⁷⁷ *Id.* at 42–53 (reporting meta-analysis of studies).

²⁷⁸ *Id.*

²⁷⁹ LEO ROSTEN, *THE NEW JOYS OF YIDDISH* 366 (1968) ("[B]oth verb and noun, schmooz means a friendly, gossipy, prolonged, heart-to-heart talk—or to have such a talk.").

²⁸⁰ See generally Don A. Moore et al., *Long and Short Routes to Success in Electronically-Mediated Negotiations: Group Affiliations and Good Vibrations*, 77

When we first met Jack we learned that he typically wanted to get right down to the business at hand, and "waste" as little time as possible. However, Jack needs to recognize that creating rapport and trust are not just niceties, or a waste of time. Instead, creating trust and rapport is necessary in order to have a truly productive relationship with his clients. Engaging in effective schmoozing is itself something of an art form, as it requires good listening skills and good memory, and a standard line may not be sufficient. Agnes may not appreciate a conversation about sports, or then again, she may happen to be an avid Yankees fan. Jack needs to try to become acquainted a bit with his clients at a more personal level.

5. *How People Learn*

Jack has never worried much about how people learn. He figures that if he says something to his client in an interview, his client will absorb it. Psychologists, on the other hand, have demonstrated a number of ways in which to improve the learning of information. First, psychologists have found that people learn by building on what they already know.²⁸¹ Thus, taking into account people's existing knowledge and beliefs can improve learning. Second, people have differing preferences about the ways in which information is presented to them. Some people prefer to receive and process information orally, others may prefer written material or do better with visual representations such as pictures or diagrams, and still others may need to be able to take notes.²⁸² Similarly, some people prefer abstract thinking, while others prefer concrete examples.²⁸³ Ultimately, people may rely on a mix of

ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 22 (1999) (finding that people who were instructed to share personal information with each other and to ask personal questions reported increased rapport); Morris et al., *supra* note 263 (finding that "schmoozers" who had a short "get acquainted" call before negotiating via e-mail felt more rapport, had fewer impasses, and had more positive impressions of each other).

²⁸¹ HOW PEOPLE LEARN: BRIDGING RESEARCH AND PRACTICE 10 (M. Suzanne Donovan et al. eds., 1999).

²⁸² See generally WALTER B. BARBE & RAYMOND H. SWASSING, TEACHING THROUGH MODALITY STRENGTHS: CONCEPTS AND PRACTICES (1979); Richard E. Mayer & Laura J. Massa, *Three Facets of Visual and Verbal Learners: Cognitive Ability, Cognitive Style, and Learning Preference*, 95 J. EDUC. PSYCHOL. 833 (2003); Richard Riding, *The Nature and Effects of Cognitive Style*, in PERSPECTIVES ON THINKING, LEARNING, AND COGNITIVE STYLES 47, 57 (Robert J. Sternberg & Li-Fang Zhang eds., 2001); but cf. Gregory P. Krätzig & Katherine D. Arbuthnott, *Perceptual Learning Style and Learning Proficiency: A Test of the Hypothesis*, 98 J. EDUC. PSYCHOL. 238, 238 (2007).

²⁸³ See, e.g., David A. Kolb et al., *Experiential Learning Theory: Previous Research*

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learning strategies and their preferences may vary with the type of learning task.²⁸⁴ Third, we know that people do not always ask questions when they do not understand or want more information. Studies that compare the perspective of patients with that of doctors are particularly illuminating—while doctors report believing that patients will ask follow-up questions if they want more information, patients prefer that doctors provide them with information without expecting them to ask.²⁸⁵

In light of this psychology, we have a few specific suggestions for Jack. First, Jack should try to build on his clients' existing knowledge base. Thus, he will need to present information differently in different contexts. If Carl Cementa has been involved in litigation before, Jack can draw on those experiences in discussing his options for dealing with Henrietta Homeowner. By contrast, if the Kiddo family has never before participated in litigation, Jack will not be able to take any knowledge for granted, and will need to explain things about the nature of discovery and the high emotional and other costs of litigation. If Mrs. Kiddo is a civil engineer, perhaps Jack can find some analogies between building a bridge and preparing a case for trial.²⁸⁶ Second, in conveying new information to his clients, Jack should not use a single approach, such as always providing verbal advice. Instead, while continuing to provide verbal advice, Jack should also use other formats. For example, following the initial interview, he may want to write letters to his clients that highlight some of the key issues that he sees and some of the choices that must be made. In some situations it may be appropriate to use graphical presentations. In particular, clients often have a difficult time understanding discussions of probability, and some may find visual representations to be useful.²⁸⁷ Along the same lines, some attorneys have found it useful to show clients "decision trees" as a means to demonstrate the probability of interrelated events.²⁸⁸ Videos, too, can sometimes be useful to

and *New Directions*, in *PERSPECTIVES ON THINKING, LEARNING, AND COGNITIVE STYLES* 227, 228 (Robert J. Sternberg & Li-Fang Zhang eds., 2001).

²⁸⁴ Krätzig & Arbuthnott, *supra* note 282, at 244.

²⁸⁵ See, e.g., Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 1003 (2003).

²⁸⁶ See generally Keith J. Holyoak, *Analogy*, in *THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING* 117 (Keith J. Holyoak & Robert G. Morrison eds., 2005).

²⁸⁷ See, e.g., Erika A. Waters et al., *Formats for Improving Risk Communication in Medical Tradeoff Decisions*, 11 J. HEALTH COMM. 167, 167–68 (2006). See also Ulrich Hoffrage et al., *Communicating Statistical Information*, SCIENCE, Dec. 22, 2000, at 2261.

²⁸⁸ See, e.g., AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE* 34–44 (1991); David P. Hoffer, *Decision Analysis as a Mediator's Tool*, 1 HARV. NEGOT. L. REV. 113,

provide clients with an understanding of events, such as depositions, that they may not have experienced.²⁸⁹ Third, now aware that confused clients will not necessarily ask clarifying questions, Jack needs to be sure to invite questions and offer additional insights even when no questions are asked.

6. *Physical Space*

Psychological research has shown that the physical environment can be important in setting the tone for an interview. Certainly, there are obvious physical issues, such as noise, excessive heat, or excessive or deficient lighting, that can be problematic.²⁹⁰ However, the research reveals that even environments that avoid such problems can still differ quite substantially in how conducive they are to effective interviewing.

Importantly, the interview setting must be private. Not surprisingly, research has shown that people are more willing to disclose relevant personal information in surroundings in which their privacy is assured.²⁹¹ In addition, in setting up his interview space, Jack ought to take into account his clients' probable preferences about their personal space—"the area individuals maintain around themselves into which others cannot intrude without arousing discomfort."²⁹² Intrusion into a person's personal space can cause distress, inhibit disclosure, and result in a negative impression of the intruder.²⁹³ While personal space preferences vary by individual and among cultures, a comfortable social distance is usually between four and twelve feet²⁹⁴ and many clients are likely to feel most comfortable with this distance

113–20 (1996).

²⁸⁹ Videos are commonly used for juror orientation. See American Judicature Society, *Prospective Jurors*, http://www.ajs.org/jc/faq/jc_faq_statelinks.asp#videos (last visited Feb. 26, 2008).

²⁹⁰ See generally Janetta Mitchell McCoy, *Work Environments*, in HANDBOOK OF ENVIRONMENTAL PSYCHOLOGY 443, 450–52 (Robert B. Bechtel & Arza Churchman eds., 2002) (reviewing research on temperature, lighting, sound, and air quality in work settings).

²⁹¹ See Charles J. Holahan & Karl A. Slaikeu, *Effects of Contrasting Degrees of Privacy on Client Self-Disclosure in a Counseling Setting*, 24 J. COUNSELING PSYCHOL. 55, 58 (1977).

²⁹² Leslie A. Hayduk, *Personal Space: Where We Now Stand*, 94 PSYCHOL. BULL. 293, 293 (1983) [hereinafter Hayduk 1983]. See also Leslie A. Hayduk, *Personal Space: An Evaluative and Orienting Overview*, 85 PSYCHOL. BULL. 117, 118 (1978) [hereinafter Hayduk 1978].

²⁹³ Hayduk 1983, *supra* note 292, at 314–15, 319.

²⁹⁴ See EDWARD T. HALL, *THE HIDDEN DIMENSION* 121–23 (1969).

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between themselves and the interviewer.²⁹⁵ Because individual clients may differ in terms of the distance at which they are comfortable interacting²⁹⁶ and because clients may feel more comfortable when they have some control over interaction distance and orientation,²⁹⁷ it may be advisable to have several seating options or chairs that can be moved so that clients can select their seating.²⁹⁸ Finally, relatively uncluttered offices have been shown to elicit more favorable reactions as compared to messy offices²⁹⁹ and there is some evidence that indicia of expertise (e.g., diplomas) increase observers' perceptions of competence.³⁰⁰ Certainly the McDonald's locale, which Jack thought would be acceptable, is far from ideal in terms of privacy, messiness, and comfort.

F. Cultural Differences

Jack has never paid much attention to cultural differences. He prides himself on being open-minded and not prejudiced. In his view, "people are people" no matter where they come from or how they were raised. Jack assumes that everyone pretty much sees the world as he does,³⁰¹ other than the fact that many people are not as intelligent as he, often act irrationally, and sometimes do not speak English very well, if at all.

In popular parlance, culture is often thought of as something exotic that

²⁹⁵ See Page K. Pressly & Martin Heesacker, *The Physical Environment and Counseling: A Review of Theory and Research*, 79 J. COUNSELING & DEV. 148, 151 (2001) (reviewing studies).

²⁹⁶ In particular, cultural or gender differences may impact the contours of personal space. See generally HALL, *supra* note 294; Hayduk 1983, *supra* note 292; Pressly & Heesacker, *supra* note 295; Nan M. Sussman & Howard M. Rosenfeld, *Influence of Culture, Language, and Sex on Conversation Distance*, 42 J. PERSONALITY & SOC. PSYCHOL. 66 (1982).

²⁹⁷ See Pressly & Heesacker, *supra* note 295, at 153 (reviewing studies).

²⁹⁸ *Id.* at 152 (reviewing literature).

²⁹⁹ See *id.*

³⁰⁰ See generally *id.* at 152–53 (reviewing studies); P. Paul Heppner & Steve Pew, *Effects of Diplomas, Awards, and Counselor Sex on Perceived Expertness*, 24 J. COUNSELING PSYCHOL. 147 (1977); Jeffrey C. Siegel, *Effects of Objective Evidence of Expertness, Nonverbal Behavior, and Subject Sex on Client-Perceived Expertness*, 27 J. COUNSELING PSYCHOL. 117 (1980); Lee Stapleton Milford, *Nonverbal Communication*, 27 (#4) LITIGATION 32, 32 (2001) (discussing pros and cons of various office environments); William T. Hoyt, *Antecedents and Effects of Perceived Therapist Credibility: A Meta-Analysis*, 43 J. COUNSELING PSYCHOL. 430 (1996).

³⁰¹ See *supra* Part III.A.4.

other people have (special accents, food, dress), but that we do not. More properly, our culture provides a set of lenses through which we see the world.³⁰² These lenses do not dictate our behavior, but may shape our perceptions and intuitive responses.³⁰³ While people tend to think of cultural differences as existing between groups who live in different parts of the world, significant cultural differences also exist within the United States. Cultural differences can be based not only on ethnicity, but also on differences in age, gender, world view, economic status, or religion. Thus, everyone operates from one or more different cultural perspectives. While culture affects many aspects of our world view,³⁰⁴ we will highlight several ways in which cultural differences may be particularly relevant to lawyers who are interviewing and counseling clients.

³⁰² Edward Hall has been one of the most prolific and best writers on culture. *See, e.g.,* EDWARD T. HALL, *THE SILENT LANGUAGE* 51–53 (1956) ("Culture [is] . . . a form of communication . . . Culture is not an exotic notion studied by a select group of anthropologists in the South Seas. It is a mold in which we are all cast, and it controls our daily lives in many unsuspected ways....[T]he real job is not to understand foreign culture but to understand our own."). *See also* Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, & LAW 47, 48 (Kimberly Holt Barrett & William H. George eds., 2005) ("Culture is the logic through which we give meaning to the world."); JESWALD W. SALACUSE, *MAKING GLOBAL DEALS: NEGOTIATING IN THE INTERNATIONAL MARKET PLACE* 45 (1991) ("Culture includes the socially transmitted beliefs, behavior patterns, values, and norms of a given community. It consists of rules, concepts, categories, and assumptions which the people of that community use to interpret their surroundings and guide their interactions with other persons within the society."); PAUL B. PEDERSEN AND ALLEN IVEY, *CULTURE-CENTERED COUNSELING AND INTERVIEWING SKILLS: A PRACTICAL GUIDE* 1 (1993) ("Culture controls our lives. We may attend to our culturally learned assumptions or we may ignore them, but in either case, these assumptions will continue to shape our decisions. Culture is not something outside ourselves, but, rather, an internalized perspective that combines the teachings of every significant person or group we have experienced, read about, or heard about and from whom we have learned something.").

³⁰³ *See* Darrin R. Lehman et al., *Psychology and Culture*, 55 ANN. REV. PSYCHOL. 689, 701 (2004) ("Culture does not rigidly determine the responses of its group members. Instead, culture provides interpretive perspectives for making sense of reality."). *See also* NADYA A. FOUAD & PATRICIA ARREDONDO, *BECOMING CULTURALLY ORIENTED: PRACTICAL ADVICE FOR PSYCHOLOGISTS AND EDUCATORS* 53 (2007) (noting, in the context of psychological counseling, the importance of being "aware of how cultural dimensions may affect a client but also remain[ing] flexible enough to understand when those dimensions conflict or are less salient to the particular issue").

³⁰⁴ *See generally* Lehman et al., *supra* note 303; RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* (2003).

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Cultures can differ in terms of their approach to dispute resolution.³⁰⁵ In particular, psychological research has shown that people from different cultures tend to differ in the importance they ascribe to the possible objectives of dispute resolution processes. Different cultures may place varying degrees of importance on goals such as maintaining relationships, achieving "justice," saving face, achieving economic gains, or laying a foundation for the future.³⁰⁶ Clients from more individualistic cultures³⁰⁷ may be primarily concerned with their own personal success.³⁰⁸ Clients from more collectivist cultures³⁰⁹ may be more highly attuned to how their behavior has affected or will affect the social standing of the broader group with which they identify, how they are viewed by that group, the joint success of the parties, or how relationships are affected.³¹⁰ In addition, a client may be concerned about the "cultural consequences" of her actions—that is, the consequences of "taking steps that are out of her culture's norm."³¹¹

Not surprisingly then, clients from different cultures also tend to display differing preferences for how to go about resolving disputes. For example, people from more individualistic cultures may prefer resolving disputes through strategies that focus on the immediate conflict, involve direct confrontation, and result in a determination of who is right and who is wrong.³¹² In contrast, those from more collectivist cultures tend to prefer

³⁰⁵ See generally THE CONFLICT AND CULTURE READER (Pat K. Chew ed., 2001); RAYMOND COHEN, NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD (1991); Michael W. Morris & Ho-Ying Fu, *How Does Culture Influence Conflict Resolution? A Dynamic Constructivist Analysis*, 19 SOC. COGNITION 324 (2001); Kwok Leung & Michael W. Morris, *Justice Through the Lens of Culture and Ethnicity*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 343, 352 (Joseph Sanders & V. Lee Hamilton eds., 2001).

³⁰⁶ Ken-Ichi Ohbuchi et al., *Cultural Values in Conflict Management: Goal Orientation, Goal Attainment, and Tactical Decision*, 30 J. CROSS-CULTURAL PSYCHOL. 51, 60 (1999).

³⁰⁷ Individualist cultures prioritize individual goals and agendas and tend to be more assertive and competitive. See NISBETT, *supra* note 304, at 47–48; Harry C. Triandis & Michele J. Gelfand, *Converging Measurement of Horizontal and Vertical Individualism and Collectivism*, 74 J. PERSONALITY & SOC. PSYCHOL. 118, 118–19 (1998).

³⁰⁸ Lehman et al., *supra* note 303, at 699–700.

³⁰⁹ Collectivist cultures tend to privilege the goals of the group and group membership. See NISBETT, *supra* note 304, at 48–49; Triandis & Gelfand, *supra* note 307, at 118–19.

³¹⁰ Triandis & Gelfand, *supra* note 307, at 118–19.

³¹¹ FOUAD & ARREDONDO, *supra* note 303, at 58.

³¹² See Lehman et al., *supra* note 303, at 700 (reviewing studies); NISBETT, *supra*

more relational strategies that involve the use of intermediaries, mediation, collaboration, accommodation, or avoidance.³¹³ In addition, cultural difference can influence whether one prefers resolving disputes by looking to universal principles or rules, or whether one prefers a case-by-case analysis of the particular circumstance involved.³¹⁴ Culture may also influence the value placed on debate,³¹⁵ and the inclination to take other perspectives³¹⁶ or to consider counterarguments.³¹⁷

Culture may also be related to differences on a variety of other dimensions that have implications for client interviewing and counseling. For example, cultures differ in terms of the meaning that is attributed to silence in an interaction,³¹⁸ the degree of formality that is expected,³¹⁹ the appropriateness of interruptions,³²⁰ understandings of the meaning of eye

note 304, at 75–76, 194; Ohbuchi et al., *supra* note 306, at 52. See also Catherine Tinsley, *Models of Conflict Resolution in Japanese, German, and American Cultures*, 83 J. APPLIED PSYCHOL. 316, 317 (1998).

³¹³ See NISBETT, *supra* note 304, at 75–76. Those from collectivist cultures may pay more attention to and give more weight to relational information. Lehman et al., *supra* note 303, at 696. See also Kwok Leung, *Some Determinants of Reactions to Procedural Models for Conflict Resolution: A Cross-National Study*, 53 J. PERSONALITY & SOC. PSYCHOL. 898, 900 (1987) (finding cultural differences in expectancies about how to accomplish goals).

³¹⁴ NISBETT, *supra* note 304, at 65, 194 (describing a preference for rules in independent cultures and a preference for case-by-case evaluation in interdependent cultures).

³¹⁵ *Id.* at 73 (describing a lack of interest in debate in interdependent cultures).

³¹⁶ See generally Dov Cohen & Alex Gunz, *As Seen By the Other . . . : Perspectives on the Self in the Memories and Emotional Perceptions of Easterners and Westerners*, 13 PSYCHOL. SCI. 55 (2002); Shali Wu & Boaz Keysar, *The Effect of Culture on Perspective Taking*, 18 PSYCHOL. SCI. 600, 605 (2007) (finding that "compared with Americans, Chinese are better at solving perspective-taking problems, make fewer errors in assessing the intentions of another person, and are less distracted by their own private perspective").

³¹⁷ See generally Kaiping Peng & Richard E. Nisbett, *Culture, Dialectics, and Reasoning About Contradiction*, 54 AM. PSYCHOLOGIST 741 (1999).

³¹⁸ See generally Richard W. Brislin & Eugene S. Kim, *Cultural Diversity in People's Understanding and Uses of Time*, 52 APPLIED PSYCHOL.: AN INT'L REV. 363, 374 (2003) (discussing reactions to periods of silence).

³¹⁹ See, e.g., Harry C. Triandis, *Some Dimensions of Intercultural Variation and Their Implications for Community Psychology*, 11 J. COMMUNITY PSYCHOL. 285, 296–97 (1983).

³²⁰ See DERALD WING SUE & DAVID SUE, *COUNSELING THE CULTURALLY DIVERSE: THEORY AND PRACTICE* 143 (2003).

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contact,³²¹ the contours of personal space,³²² conceptions of time,³²³ conventions about the display of emotion,³²⁴ the appropriateness of self-disclosure,³²⁵ how agency is viewed,³²⁶ and attitudes toward authority.³²⁷ In addition, one's cultural background is related to the ways in which one perceives associations among people and events in the world. In particular, psychological research has shown cultural variation in people's tendency to make dispositional attributions—people from more interdependent cultures are more likely to pay attention to the whole context and to make attributions that are more strongly influenced by situational factors.³²⁸ Similarly, people from collectivist cultures have been shown to be less susceptible to making self-serving judgments.³²⁹

In applying these insights the attorney's challenge is to recognize that persons from different cultures see the world differently, while at the same time avoiding the trap of assuming that all persons from a particular culture

³²¹ *Id.*

³²² See *supra* notes 292–95 and accompanying text.

³²³ See generally Brislin & Kim, *supra* note 318 (reviewing studies related to punctuality, clock versus event time, time on task, multitasking, pace of life, time horizons, and work versus leisure tradeoffs, among others).

³²⁴ David Matsumoto, *Ethnic Differences in Affect Intensity, Emotion Judgments, Display Rule Attitudes, and Self-Reported Emotional Expression in an American Sample*, 17 MOTIVATION & EMOTION 107, 118 (1993); Nathan Yrizarry et al., *Culture and Emotion*, in CROSS-CULTURAL TOPICS IN PSYCHOLOGY 131, 132 (Leonore Loeb Adler & Uwe P. Gielen eds., 2001).

³²⁵ See, e.g., Rosaleen Ow & Dafna Katz, *Family Secrets and the Disclosure of Distressful Information in Chinese Families*, 80 FAM. IN SOC'Y 620, 620 (1999).

³²⁶ Lehman et al., *supra* note 303, at 698–99 (describing cultural differences in whether personal or group agency is privileged).

³²⁷ See generally GEERT H. HOFSTEDE, *CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* (1989) (describing cultural value dimension of "power distance" or the degree to which people prefer autocratic or consultative authority); Tom R. Tyler et al., *Cultural Values and Authority Relations: The Psychology of Conflict Resolution Across Cultures*, 6 PSYCHOL. PUB. POL'Y & L. 1138 (2000).

³²⁸ See Incheol Choi et al., *Causal Attribution Across Cultures: Variation and Universality*, 125 PSYCHOL. BULL. 47, 51–53 (1999); Lehman et al., *supra* note 303, at 696; Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY & SOC. PSYCHOL. 949, 961 (1994); NISBETT, *supra* note 304, at 129. People from collectivist cultures tend to consider the relevance of a wider range of factors, considering a situation holistically. See *id.* at 89–96, 111–35; Takahiko Masuda & Richard E. Nisbett, *Attending Holistically Versus Analytically: Comparing the Context Sensitivity of Japanese and Americans*, 81 J. PERSONALITY & SOC. PSYCHOL. 922, 922 (2001).

³²⁹ Lehman et al., *supra* note 303, at 698.

see the world the same way. That is,

[t]he task here is to appreciate and respect the differences among your clients, but without resorting to stereotypes or stubborn myths about race, sex, ethnicity, and culture. To ignore likely differences in culture is an invitation to malpractice in counseling; to presume you know what those differences will be once you know your client's race or sex or cultural background is an invitation to dehumanize or reify your client, and to assume generalizations that may not apply to him.³³⁰

Jack's major task is to realize that things which he takes as a given may not be well accepted by others. For example, Jack has noted that he believes it is best to be somewhat informal with clients, to use first names, to shake hands, and to look his clients directly in the eye.³³¹ Yet, while these conventions seem "natural" to many Americans, they are not universally accepted. Depending on what culture Agnes Ageout is from, she may be uncomfortable touching the hand of a male who is essentially a stranger or may be insulted by direct eye contact. Carl Cementa may not appreciate the informality of first names, particularly if used by a man younger than he.

Similarly, Jack should not assume, based on his own culture, that Edna Employee is most concerned about obtaining monetary compensation for her termination, or that she views her termination as an individual harm. Perhaps Edna comes from a culture in which her termination is seen as a mark of shame that harms not only her but also others in her family. If so, Edna may care more about cleansing her record and obtaining an apology than about receiving monetary compensation. Also, Edna may need to bring her family or extended family into discussions in order to resolve her dispute through negotiation. Jack may want to discuss with Edna the possibility of trying to mediate her dispute in a setting that would allow not only Edna, but potentially members of her family to participate as well.³³²

Cultural sensitivity may also help Jack realize that clients who, to him, may seem "difficult" are actually just different. If Edna comes from a collectivist culture, she may not feel comfortable with confidentiality rules that lead Jack to try to exclude Edna's family from the interview. Or, Jack

³³⁰ Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 378 (2003). See also *supra* Part III.A.2.

³³¹ See *supra* Part II.

³³² Such mediations are fairly common in Hawaii, where persons often come from a more collectivist orientation than elsewhere in the United States. See generally James A. Wall, Jr. & Ronda Roberts Callister, *Ho'oponopono: Some Lessons from Hawaiian Mediation*, 11 NEGOT. J. 45 (1995).

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may be angered if Mr. Kiddo nods in a seemingly approving way as Jack describes a possible course of action and then, at the end, disapproves of following that course. Yet, in Mr. Kiddo's culture nodding may signify understanding rather than approval.³³³ Agnes Ageout's unwillingness to consider or discuss marrying her boyfriend, Lenny, may also reflect cultural issues such as differences in supposed caste or status or age. Carl Cementa's habitual "lateness" may reflect a different sense of time, rather than sloppiness or a lack of care for his case or his attorney.³³⁴

In addition, clients' own perceptions of their attorney will also be affected by their culture. The steps Jack will want to take to try to establish his competence and to gain his clients' trust may depend in part on his clients' and his own cultural background.³³⁵ For example, depending on his client's cultural background, Jack may want to dress more or less formally, set up the conference room in a particular way, start the conversation with a recitation of his credentials, or ask a member of his firm with a similar background to sit in on the initial interview.

*G. The Relevance of Perceived Justice and Injustice*³³⁶

Like many lawyers, Jack has never given a lot of thought to the concept of justice. Indeed, he tends to think that the concept is somewhat bogus. He assumes that his clients will feel treated justly, to the extent that they even care about justice, if they receive a lot of money (as plaintiffs) or avoid having to pay a lot of money (as defendants). One of Jack's heroes is Jerry Facher, one of the "big firm" defense lawyers made famous in the book and

³³³ See Bryant & Peters, *supra* note 302, at 49.

³³⁴ See Brislin & Kim, *supra* note 318, at 367.

³³⁵ See Teresa D. LaFromboise & David N. Dixon, *American Indian Perception of Trustworthiness in a Counseling Interview*, 28 J. COUNSELING PSYCHOL. 135, 138 (1981); Ruth H. Gim et al., *Asian-American Acculturation, Counselor Ethnicity and Cultural Sensitivity, and Ratings of Counselors*, 38 J. COUNSELING PSYCHOL. 57, 60 (1991) (Asian mental health clients found culturally sensitive mental health providers more credible than those who were not.); Donald R. Atkinson et al., *Mexican-American Acculturation, Counselor Ethnicity and Cultural Sensitivity, and Perceived Counselor Competence*, 39 J. COUNSELING PSYCHOL. 515, 518 (1992) (finding similar results based on study of Mexican Americans).

³³⁶ See generally THE JUSTICE MOTIVE IN EVERYDAY LIFE (Michael Ross & Dale T. Miller eds., 2002); Tom R. Tyler & Heather J. Smith, *Social Justice and Social Movements*, in HANDBOOK OF SOCIAL PSYCHOLOGY, Vol. 2, at 595 (Daniel Gilbert et al. eds., 1998); HANDBOOK OF JUSTICE RESEARCH IN LAW (Joseph Sanders & V. Lee Hamilton eds., 2001).

movie *A Civil Action*. Facher famously said after a session of cross examination: "The truth? The truth is at the bottom of a bottomless pit."³³⁷ Jack thinks the same could be said of justice.

Psychologists, in contrast, have learned that people often care a great deal about various types of justice. Individuals are concerned with the distributive fairness of their outcomes, with the procedural and interactional fairness of the process itself, and with achieving an appropriate level of retribution. Lawyers who are aware of these various aspects of justice can do a more effective job of representing their clients than those who are not.

1. *Distributive Justice*

Models of distributive justice attempt to explain how people determine whether an outcome is substantively fair. The distributive fairness of an outcome can be judged by a number of metrics, including principles of equity (distribution in proportion to relative contribution), equality (distribution by equal shares), or need (distribution in proportion to need).³³⁸ Which of these metrics is chosen by an individual depends in part on their goals (e.g., productivity or harmony),³³⁹ the relationships among the parties,³⁴⁰ and the

³³⁷ JONATHAN HARR, *A CIVIL ACTION* 340 (1995). See also *A CIVIL ACTION* (Touchstone Pictures 1999).

³³⁸ See Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will be Used as the Basis of Distributive Justice?*, 31 J. SOC. ISSUES 137, 143–47 (Summer 1975); see also Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151, 152–53 (1973).

³³⁹ See Edith Barrett-Howard & Tom R. Tyler, *Procedural Justice as a Criterion in Allocation Decisions*, 50 J. PERSONALITY & SOC. PSYCHOL. 296, 300–01 (1986). See generally TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 56–62 (1997) (discussing the criteria people use for analyzing distributive justice). For example, one of Carl Cementa's goals is to minimize his payout to unhappy clients so as to maximize his own wealth. However, Carl also hopes to maximize former client happiness, or at least minimize their unhappiness, so as to help his longer term efforts to retain old clients and attract new clients. Thus, even if he could potentially negotiate a solution where he paid nothing to and did nothing for Henrietta, this might not serve his longer term goals.

³⁴⁰ Alan Page Fiske, *The Four Elementary Forms of Sociality: Framework for a Unified Theory of Social Relations*, 99 PSYCHOL. REV. 689, 690–93 (1992) (distinguishing relationships based on communal sharing, authority ranking, equality matching, and market pricing). For example, even though Agnes Aged may, at some level, want to leave all her wealth to Lenny, she may also need to consider the nature of her relationship with her family and the extent to which the family's challenge of her will, if it were to occur, might bring grief to Lenny.

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type of resource at issue.³⁴¹ Importantly, regardless of which of these metrics is used, people resist agreeing to substantive outcomes that do not comport with their notions of substantive fairness.³⁴²

If Jack is knowledgeable about the psychology of distributive justice, he will be able to question clients more effectively about their range of goals. Rather than simply assume that the Kiddos want the most money possible in compensation for the injury suffered by their son, Jack can ask the Kiddos more broadly what kind of relief they are seeking. He can suggest the possibility of internal measures that might be taken by the company (e.g. take the magnetic balls off the market, increase their size, improve warning labels); public or private apologies that might be demanded; or non-monetary compensation that might be sought, such as continued medical care for Kyle.

In addition, Jack's knowledge of the psychology of distributive justice can help him, even in an initial interview, to begin to prepare his clients to think about settlement prospects. As noted, clients often resist outcomes that they do not believe are completely fair.³⁴³ Yet, the nature of settlement is often that neither side will feel completely vindicated. Jack can begin to prepare his clients to think about settlements by helping them to see that

³⁴¹ Foa and colleagues distinguish six categories of resources: money, goods, services, information, status, and love. See Gregory V. Donnenwerth & Uriel G. Foa, *Effect of Resource Class on Retaliation to Injustice in Interpersonal Exchange*, 29 J. PERSONALITY & SOC. PSYCHOL. 785, 786 (1974); Jim L. Turner et al., *Interpersonal Reinforcers: Classification, Interrelationship, and Some Differential Properties*, 19 J. PERSONALITY & SOC. PSYCHOL. 168, 169 (1971). See also Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-Offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255, 285–86 (1997). Although Jack may assume that Edna cares most about bettering her financial situation, given her termination, she may place as much or more value on clearing her reputation, obtaining a new job, or setting precedent. One of Jean Sternlight's clients once cared a great deal about getting a plaque recognizing his twenty-five years of good service to his former employer, although that employer had ultimately fired him and although the plaque had no monetary value.

³⁴² Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in BARRIERS TO CONFLICT RESOLUTION 86 (Kenneth J. Arrow et al. eds., 1995); Max H. Bazerman et al., *Perceptions of Fairness in Interpersonal and Individual Choice Situations*, 4 (#2) CURRENT DIRECTIONS IN PSYCHOL. SCI. 39, 39–40 (1995); Alvin E. Roth, *Bargaining Experiments*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 253, 282–302 (John H. Kagel & Alvin E. Roth eds., 1995); RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 21–35 (1992). See generally George F. Loewenstein et al., *Social Utility and Decision Making in Interpersonal Contexts*, 57 J. PERSONALITY & SOC. PSYCHOL. 426 (1989); Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753 (2004).

³⁴³ See *supra* note 342 and accompanying text.

there are a range of metrics for judging distributive justice and that their own view of a fair solution, and that of their adversary, may likely be quite different.³⁴⁴ For example, Jack might ask Carl to consider what Henrietta might believe would be a fair resolution of her complaints against Carl's company. Similarly, Jack may want to note that while most disputes are ultimately resolved through settlements, neither side necessarily achieves everything it wants in a settlement. While this point will seem entirely obvious, it is nonetheless quite common for clients to reject settlement proposals on the ground that they think they could do better in court.³⁴⁵ This is another way for the client to say that she believes the proposed settlement is unjust. In the initial interview Jack may find it wise to begin to prepare his clients for the fact that settlements do not typically provide what either side sees as a perfectly just resolution to the dispute.³⁴⁶

2. Procedural Justice

Perceptions of *procedural* justice relate to the fairness of the processes, procedures, and rules by which a decision is reached.³⁴⁷ People take into account a variety of concerns in making judgments of procedural justice. In particular, when evaluating the features of a decisionmaking procedure, people pay attention to both the quality of decisions and the quality of interpersonal treatment such features produce.³⁴⁸ Thus, procedures are considered to be more fair to the extent that they incorporate features—the use of objective decision criteria, the opportunity for voice, neutrality, and trustworthiness—that are thought to produce fair outcomes.³⁴⁹ In addition,

³⁴⁴ See *supra* note 338 and accompanying text.

³⁴⁵ For a discussion of the reasons cases do not settle, see Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 50–59 (1996).

³⁴⁶ Attorneys who, alternatively, lead their clients to be wildly optimistic as to their chances of prevailing in litigation or obtaining a highly desirable settlement often must face the problem of very angry clients when, later in the course of the representation, such assurances cannot be fulfilled. See generally Kritzer, *supra* note 114.

³⁴⁷ See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TYLER ET AL., *supra* note 339, at 88–89 (1997).

³⁴⁸ Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 748 (2003).

³⁴⁹ *Id.* at 748. For a discussion of procedural justice as a fairness heuristic, see E. Allan Lind, *Fairness Judgments as Cognitions*, in *THE JUSTICE MOTIVE IN EVERYDAY LIFE* 416, 421 (Michael Ross & Dale T. Miller eds., 2002). E. Allan Lind et al.,

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procedures are considered to be more fair to the extent that they ensure dignified and respectful treatment.³⁵⁰ In making these evaluations of procedural fairness, people tend to be concerned both with whether the formal "policies, rules, and prevailing norms of the group as a whole" are fair, as well as with whether individuals act fairly in carrying out the formal rules.³⁵¹ The manner in which an individual is treated signals information about the degree to which he or she is valued by others in the system.³⁵² Therefore, "treatment with dignity and respect are important because they tell people that they have status within the group."³⁵³ In contrast, treatment that does not signal dignity and respect conveys a message that indicates a lack of status within the community.

When people believe that a decisionmaking procedure is fair, they are more likely to believe that the outcome produced by that procedure is fair,³⁵⁴ have more respect for the institution or decisionmaker,³⁵⁵ are more willing to

Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic, 38 ADMIN. SCI. Q. 224, 226 (1993).

³⁵⁰ Blader & Tyler, *supra* note 348, at 748. See also Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527, 530 (2001); Robert J. Bies, *The Predicament of Injustice: The Management of Moral Outrage*, 9 RES. IN ORGANIZATIONAL BEHAV. 289, 292 (1987) [hereinafter Bies, *Predicament of Injustice*]; Robert J. Bies & Joseph S. Moag, *Interactional Justice: Communication Criteria of Fairness*, 1 RES. ON NEGOT. IN ORG. 43, 47 (1986); Robert J. Bies, *Are Procedural Justice and Interactional Justice Conceptually Distinct?*, in HANDBOOK OF ORGANIZATIONAL JUSTICE 85, 85–112 (Jerald A. Greenberg & Jason A. Colquitt eds., 2005).

³⁵¹ Blader & Tyler, *supra* note 348, at 749. Accordingly, people care about both the formal and informal aspects of decisionmaking quality and also about the formal and informal aspects of the quality of their treatment. *Id.* (describing evidence for this four-factor model).

³⁵² See LIND & TYLER, *supra* note 347; Tom R. Tyler, *Procedural Strategies for Gaining Deference: Increasing Social Harmony or Creating False Consciousness?*, in SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS 69 (John M. Darley et al. eds., 2001).

³⁵³ Tyler, *supra* note 352, at 80. According to social identity theory, individuals construct their social identity using information they acquire as they interact with others. See generally Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 ANN. REV. PSYCHOL. 1 (1982). In the context of procedural justice, Tyler argues that "[p]eople may value this favorable identity-relevant information more than they value receiving fair or favorable outcomes." Tyler, *supra* note 352, at 80.

³⁵⁴ See Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128 (1988).

³⁵⁵ See Tom R. Tyler & Peter Degoey, *Collective Restraint in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities*, 69 J.

comply with the decision reached,³⁵⁶ and have more positive opinions of the social policies that are formulated under the procedure.³⁵⁷ Similarly, fair, interpersonal treatment in negotiation has been shown to diminish self-serving bias, reduce the likelihood of impasse, and increase satisfaction with substantive outcomes.³⁵⁸

Procedural justice theory is obviously relevant in considering whether a formal courtroom or administrative hearing procedure is fair. However, it also has implications for less formal procedures such as mediation or negotiation.³⁵⁹ As Jack counsels his clients on the choice of procedures for resolving their disputes, he ought keep in mind the ways in which various approaches to dispute resolution may impact procedural justice perceptions. In addition, procedural justice theory provides a lens through which attorneys can better understand clients' perspectives on the events that have led them to consult a lawyer. One study on layoffs found that employees who did not receive any explanation as to why they were being let go were the most angry about their treatment.³⁶⁰ If Jack learns that Edna not only received no explanation as to why she was terminated, but was also escorted out of the building immediately by security, the procedural justice literature will help Jack understand Edna's sense of violation and loss of respect.

The procedural justice literature can also be applied to the interview

PERSONALITY & SOC. PSYCHOL. 482, 488 (1995).

³⁵⁶ See generally E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in EVERYDAY PRACTICES AND TROUBLE CASES 192 (Austin Sarat et al. eds., 1998); Lind et al., *supra* note 349, at 225 (1993); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

³⁵⁷ See Tyler & Degoey, *supra* note 355, at 482.

³⁵⁸ See, e.g., Kwok Leung et al., *Effects of Interactional Justice on Egocentric Bias in Resource Allocation Decisions*, 89 J. APPLIED PSYCHOL. 405 (2004); Tina Nabatchi & Lisa B. Bingham, *Expanding Our Models of Justice in Dispute Resolution: A Field Test of the Contribution of Interactional Justice*, IACM 15th Annual Conference, <http://ssrn.com/abstract=305205> (finding that an index comprised of questions about the interactions between the negotiators had a significant influence on outcome satisfaction).

³⁵⁹ See Tom Tyler & Steven L. Blader, *Justice and Negotiation*, in THE HANDBOOK OF NEGOTIATION AND CULTURE 295 (Michele J. Gelfand & Jeanne M. Brett eds., 2004) (discussing how justice judgments influence negotiation); Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 187-91 (discussing how procedural justice factors may apply to mediation). See also Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 860 (2001) (arguing that all court-connected third-party processes "should and must be judged against the standard of procedural justice").

³⁶⁰ See Barclay et al., *supra* note 79, at 630.

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process itself. When attorneys conduct interviews they are providing their clients with an exposure to our system of justice, in its broad sense. Author Jean Sternlight, in her prior incarnation as a plaintiff-side employment attorney,³⁶¹ conducted many interviews with persons such as Edna, who believed they had been treated unfairly in the course of their employment. On countless occasions Sternlight found herself having to provide such clients with the bad news that their claim would likely fail on the merits or that, while theoretically meritorious, their claim was not economically viable. *Nonetheless*, many of these clients, having received such bad news, still told Sternlight that they felt much better for having had the opportunity to at least tell their story to a neutral person who could give them some feedback on whether they had been treated illegally. Often such clients, while told they "did not have a case," left the office seemingly happier than when they had entered. Accordingly, Jack can make sure he gives his clients a full opportunity to tell their story and explain to his clients how their treatment likely compares to that of other similarly situated persons. He should be careful not to interrupt his clients or otherwise treat them rudely, as this would not be consistent with the dignified treatment associated with procedural justice.

There are several reasons why Jack might want to interview his clients in a way that would leave them feeling that they had experienced procedural justice. First, as an attorney who cares about his clients' welfare, he should want them to have a rewarding interview experience. Second, providing procedural justice in the interview may increase his clients' satisfaction with proposed settlements. Clients who have not had the opportunity to present their grievances may resist settling and look to a trial to obtain procedural justice. Third, providing greater satisfaction to his clients by giving them a procedurally just experience may ultimately lead to more client referrals.

3. *Retributive Justice*

Finally, retributive impulses can be triggered by the outrage that is experienced when an offender violates a community norm and causes

³⁶¹ Sternlight worked for a small firm in Philadelphia, Samuel & Ballard P.C., from 1983–92. Professor Ann McGinley, also a former plaintiff-side employment attorney, reports a similar experience: "I found that clients needed to talk about their experience at work. Often, even if they did not have a legal case, they were comfortable and relieved to have told the story to me. I gave them sympathy and expressed regret that the law did not recognize their loss. I explained that I understood that what they had experienced was real and painful. They often went away happy that they had been heard, at least by me." E-mail from Ann C. McGinley to Jean Sternlight (July 11, 2007) (on file with authors).

harm.³⁶² "Retribution is concerned primarily with the elimination of a sense of injustice" that results from the offense and implicates issues of whether, how, and how much punishment is warranted.³⁶³ Retributive justice, then, is aimed at reasserting the value of the violated norm, providing the offender with his or her just deserts, and alleviating the harm that resulted from the violation.

Understanding the human craving for retribution or vengeance may help Jack better understand the desires of his clients. Whereas Jack tends to try to solve all legal problems monetarily in order to compensate for harm that was done, at least some of his clients may place a higher premium on retributive concerns than on compensation. Thus, in questioning Edna, Jack should be aware that Edna may be very interested in punishing the supervisor who targeted her for termination, or in requiring the company to make a public or at least private apology. Learning about these desires may eventually help Jack settle the case.

H. How People Make Decisions

The counseling portion of an interview³⁶⁴ is designed to help clients make or at least start to make decisions. In the litigation context, potential plaintiffs like Edna and the Kiddos must, for example, decide whether to initiate settlement discussions, whether to invite the opposition to participate in mediation or arbitration, whether to commence litigation, or whether to take no legal steps at all. Clients who are defendants or potential defendants in a lawsuit, such as Carl, must similarly decide whether to try to settle the claim expeditiously, and if so how. If they choose not to settle or cannot settle early, they must explore other procedural options including, if they are sued, how to defend the lawsuit. Transactional clients like Agnes must begin to decide how to structure the transaction, and how to communicate the terms of the transaction to affected persons, if at all. While philosophies differ regarding how directive lawyers should be in helping clients make these sorts

³⁶² See Neil Vidmar, *Retributive Justice: Its Social Context*, in *THE JUSTICE MOTIVE IN EVERYDAY LIFE* 291 (Michael Ross & Dale T. Miller eds., 2002). See also John Darley, *Just Punishments: Research on Retributional Justice*, in *THE JUSTICE MOTIVE IN EVERYDAY LIFE* 314 (Michael Ross & Dale T. Miller eds., 2002).

³⁶³ Dale T. Miller & Neil Vidmar, *The Social Psychology of Punishment Reactions*, in *THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF SCARCITY AND CHANGE* 145, 146 (Melvin J. Lerner & Sally C. Lerner eds., 1981).

³⁶⁴ We focus here on the initial counseling session. Subsequent counseling, such as counseling about settlement will involve other aspects of psychology not covered here.

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of decisions,³⁶⁵ both directive and non-directive lawyers need to understand how clients structure and make decisions in order to be effective as counselors.³⁶⁶

1. "Rational" Decisionmaking

In making decisions we might strive to have the time and resources to be able to obtain all the information needed to make an informed decision, fully analyze all the relevant options, and make explicit trade-offs among all the relevant dimensions of the decision problem. Indeed, in some abstract models:

[D]ecisionmakers are assumed to (1) perfectly define the problem, (2) identify all criteria, (3) accurately weigh all of the criteria according to their preferences, (4) know all relevant alternatives, (5) accurately assess each alternative based on each criterion, and (6) accurately calculate and choose the alternative with the highest perceived value.³⁶⁷

Yet, in the real world, there are a variety of reasons that perfectly rational decisionmaking based on full information does not take place. First, human beings often use cognitive strategies that result in analysis that can depart in predictable ways from perfect rationality.³⁶⁸ Second, we do not and probably

³⁶⁵ See SHAFFER & ELKINS, *supra* note 8 at 10–16 (contrasting "instrumental" view of lawyering, in which client is viewed as a "necessary nuisance," with more client-centered approach advocated by the authors). See generally Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006) (showing that exponents of client-centered representation have differing views regarding the meaning of that often-praised phrase).

³⁶⁶ See Kathleen M. Galotti, *Decision Structuring in Important Real-Life Choices*, 18 PSYCHOL. SCI. 320, 320 (2007) (using the phrase "decision structuring" to describe "the phase in which the individual considers options and decides on criteria to be used in choosing among those options"); John M.A. DiPippa, *How Prospect Theory Can Improve Legal Counseling*, 24 U. ARK. LITTLE ROCK L. REV. 81 (2002) (discussing how psychology of non-rational choice can be used to improve counseling of legal clients).

³⁶⁷ BAZERMAN, *supra* note 126, at 3–4 (1994). See JOHN W. PAYNE ET AL., *THE ADAPTIVE DECISION MAKER* 24 (1993) (describing weighted additive rule); JONATHAN BARON, *THINKING AND DECIDING* 312–15 (3d ed. 2000) (describing multi-attribute utility theory (MAUT)). These approaches are compensatory decisionmaking strategies in that they utilize all the available information and make explicit trade-offs. PAYNE ET AL., *supra*, at 24.

³⁶⁸ See *supra* Part III.A and III.B; *infra* Part III.H. See generally BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); Christine Jolls et al., *A Behavioral*

cannot make decisions based on full information. Gathering information is costly, time consuming, and sometimes impossible. For example, when clients such as Edna and the Kiddos decide whether to try to negotiate a resolution to their situation prior to commencing litigation, they and their lawyers must make an assessment as to how the opposing party might respond to settlement proposals both prior and subsequent to the commencement of a lawsuit. They must also consider what the likely costs (financial and otherwise) of a lawsuit would be, and what the likely results of a lawsuit might be. Absent a crystal ball, none of this information is completely knowable.³⁶⁹

Furthermore, even if we could gather all that information, we also lack the time and capacity to consider a near infinite number of options.³⁷⁰ Were we to try to make decisions based on completely full information, we would probably not be able to make any decisions at all. Even in a simple legal dispute, for example, the client and attorney might consider whether to negotiate before litigating; who should conduct any such negotiations (attorney or client); whether negotiations should be conducted by letter, e-mail, phone, or in person; and with whom negotiations should be attempted. The list of potential options is essentially infinite, particularly given that background facts will continue to change.

Approach to Law and Economics, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1053 (2000); Daniel J. Keys & Barry Schwartz, "Leaky" Rationality: How Research on Behavioral Decision Making Challenges Normative Standards of Rationality, 2 PERSP. ON PSYCHOL. SCI. 162, 162 (2007) (arguing that because "the psychological processes that affect decisions may be said also to 'leak' into one's experience[s]," the "formal principles of rationality do not provide a good enough normative standard against which to assess decisionmaking").

³⁶⁹ Some students, lawyers, or clients may assume that it is always best to sue first, in order to show one has some clout and lay claim to the preferred forum, and then negotiate later, from a position of strength. While this is sometimes the best approach, there also are circumstances under which it will make sense to negotiate first. For example, initiating litigation actually worsens one's bargaining position where the opposing party would prefer to avoid the publicity that accompanies a lawsuit. Similarly, filing suit can potentially harm a plaintiff's reputation in certain circles or cause a defendant to feel compelled to clear its name in public.

³⁷⁰ Indeed, having more options to consider is not necessarily or always a good thing. See BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2004); Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601 (2003).

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2. *Alternative Decisionmaking Strategies*

Thus, while an approach to decisionmaking based on assumptions of perfect rationality and full information may seem ideal, it is for good reason that both lawyers and clients use a variety of decisionmaking strategies that depart from this model. For example, people may examine options one by one until they find an option that satisfies a predetermined set of minimum requirements—a process known as "satisficing."³⁷¹ When decisionmakers satisfice, they do not compare all the options and attempt to find the "best" one, but settle for the first "good enough" or minimally acceptable option they encounter.³⁷² Following a somewhat similar strategy—"elimination by aspects"—decisionmakers eliminate options that do not meet some threshold on a particular attribute.³⁷³ This process is continued with successive attributes until a single option remains.³⁷⁴ Other strategies include choosing the option that rates the highest on the attribute that is deemed to be the most important;³⁷⁵ choosing the option that is better on a majority of attributes;³⁷⁶

³⁷¹ HERBERT A. SIMON, *MODELS OF MAN* 204–06 (1957). See also Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99, 118 (1955) (concluding that people seek results that are "good enough").

³⁷² SIMON, *supra* note 371, at 204–05. Satisficing is an example of a non-compensatory approach to decisionmaking. In non-compensatory decisionmaking, tradeoffs are not made between the attributes of options. Thus, "excellent values on some attributes cannot compensate for poor values on other attributes." PAYNE ET AL., *supra* note 367, at 2; see also Ilan Yaniv & Yaacov Schul, *Acceptance and Elimination Procedures in Choice: Noncomplementarity and the Role of Implied Status Quo*, 82 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 293, 295 (2000); BARON, *supra* note 367.

³⁷³ See Amos Tversky, *Elimination by Aspects: A Theory of Choice*, 79 PSYCHOL. REV. 281, 285 (1972).

³⁷⁴ *Id.* Ultimately, one must find an attribute that distinguishes remaining options. *Id.*

³⁷⁵ PAYNE ET AL., *supra* note 367, at 26 (describing the "lexicographic heuristic"); Gerd Gigerenzer & Daniel G. Goldstein, *Betting on One Good Reason: The Take the Best Heuristic*, in *SIMPLE HEURISTICS THAT MAKE US SMART* 75, 80–81 (Gerd Gigerenzer et al. eds., 1999) (describing the "Take the Best" heuristic). Ties can be broken by looking to the next most important attribute. PAYNE ET AL., *supra* note 367, at 26; see also Paul Slovic, *Choice Between Equally Valued Alternatives*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 280 (1975).

³⁷⁶ PAYNE ET AL., *supra* note 367, at 27 (describing the "majority of confirming dimensions" approach which involves a series of pairwise comparisons between options, each time retaining the option that fares better on more dimensions). This is a partially compensatory strategy.

choosing the option chosen last time³⁷⁷ or based on the attribute used the last time;³⁷⁸ choosing the first option that comes to mind;³⁷⁹ or choosing an option based on what other people have chosen under similar circumstances.³⁸⁰ Each of these strategies may well fail to provide the "best" course of action, yet such strategies are used because of the costs and limitations of alternative choice processes and may sometimes be the "best" under such circumstances. Indeed, there is evidence that people who satisfice are more satisfied with their choices than are those who attempt to maximize.³⁸¹

Lawyers who are knowledgeable about decisionmaking strategies can help their clients in several ways. First, such lawyers will not necessarily attempt to make decisions based on full information or infinite options. Rather, they will recognize that information is costly and that there are tradeoffs between seeking more information and making a decision based on existing information. Second, knowing that decisions based on full information are virtually impossible, attorneys will help their client choose a good decisionmaking strategy that is consistent with the client's goals, budget,³⁸² and need to make a prompt decision.³⁸³ Armed with this insight, Jack might say:

Mr. and Mrs. Kiddo, we are going to need to make a decision whether to

³⁷⁷ *Id.* at 29 (describing the "habitual heuristic").

³⁷⁸ Gigerenzer & Goldstein, *supra* note 375, at 80 (describing the "Take the Last" heuristic).

³⁷⁹ Daniel G. Goldstein et al., *Group Report: Why and When Do Simple Heuristics Work?*, in *BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX* 173, 177 (Gerd Gigerenzer & Reinhard Selten eds., 2001) (describing the "Take the First" heuristic).

³⁸⁰ Gerd Gigerenzer & Peter M. Todd, *Fast and Frugal Heuristics: The Adaptive Toolbox*, in *SIMPLE HEURISTICS THAT MAKE US SMART* 3, 31–32 (Gerd Gigerenzer et al. eds., 1999) (describing heuristics based on imitation).

³⁸¹ See, e.g., Barry Schwartz et al., *Maximizing Versus Satisficing: Happiness is a Matter of Choice*, 83 J. PERSONALITY & SOC. PSYCHOL. 1178, 1179 (2002); see also Sheena S. Iyengar et al., *Doing Better But Feeling Worse: Looking for the "Best" Job Undermines Satisfaction*, 17 PSYCHOL. SCI. 143, 147 (2006).

³⁸² Some clients may, based on their goals and budget, want to choose a more complete decisionmaking process than others. That is, a client who is doing estate planning for a \$20 million estate needs and can afford a more complete review of options than a client like Agnes, with a \$200,000 estate, may need or be able to afford.

³⁸³ Sometimes an attorney and client will believe that they need to make a process choice quickly based on factors such as the availability of a key decisionmaker, possible impending bankruptcy, the fear that the opponent will bring a lawsuit first and thus obtain their choice of forum, or the concern that certain information may become public.

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initiate litigation fairly soon against the company, or whether we should, instead, attempt to negotiate a resolution prior to commencing litigation. Ideally it would be great if we could have all possible information before making this decision, such as our likelihood of prevailing in court, how much we would recover if successful, and how the company is likely to respond to a settlement demand. Unfortunately, we will never have all the answers. So, we must decide how much research we want to do before deciding which course of action to follow. What are your thoughts at present?

Such a comment will invite the Kiddos to provide their initial thoughts on litigation versus settlement, while also providing an opportunity to let them know that all strategies carry risk.

3. Seeking Information

When people do attempt to generate more information to guide their decisionmaking, they may not always act optimally.³⁸⁴ Setting aside the costs of gathering information, it is generally useful to gather lots of information and generate lots of options. However, people sometimes seek information that is irrelevant in that it would not alter their decisions.³⁸⁵ For example, in one study people were asked to decide whether to book a vacation at an attractive price that was about to expire, to decline to book the vacation, or to pay a small fee to preserve the option to purchase at the sale price for two additional days.³⁸⁶ The majority of people who were told that they had just passed a major exam *and* the majority of people who were told that they had failed the exam chose to purchase the vacation.³⁸⁷ However, people who were told that they would learn the results of the exam the following day tended to choose to defer the decision about the vacation until they learned whether they passed or failed.³⁸⁸ Thus, when the information (pass v. fail)

³⁸⁴ See generally Anthony Bastardi & Eldar Shafir, *Nonconsequential Reasoning and Its Consequences*, 9 CURRENT DIRECTIONS PSYCHOL. SCI. 216 (2000).

³⁸⁵ *Id.* The "sure-thing principle" holds that "if one prefers *x* to *y* given any possible state of the world, then one should prefer *x* to *y* even when the exact state of the world is not known." *Id.* at 216.

³⁸⁶ Amos Tversky & Eldar Shafir, *The Disjunction Effect in Choice Under Uncertainty*, 3 PSYCHOL. SCI. 305, 305 (1992).

³⁸⁷ *Id.* Of those who were told that they had passed the exam, 54% chose to purchase the vacation; of those who were told that they had failed, 57% chose to do so. Only 30% of the pass group and 31% of the fail group chose to preserve their option. *Id.*

³⁸⁸ *Id.* at 305–06. 61% chose to pay to preserve their option. *Id.* at 306.

was available at the outset, it did not influence decisions about the vacation. Nonetheless, people in the group that lacked the information preferred to wait for this information before making a decision, apparently failing to recognize that the information would not otherwise affect their decision.³⁸⁹ Other similar studies have found that people are particularly likely to seek out additional information when their decision is difficult to make.³⁹⁰

Not only can the process of searching or waiting for this irrelevant information be costly, but it can also change the nature of the decision, turning information that initially had no value into information that can make a difference. Importantly, there is evidence that "[w]aiting for information that appears relevant to a decision can raise the extent to which it is brought before one's attention and thus increase its influence on choice."³⁹¹ Because people do not want to conceive of themselves as choosing to seek out irrelevant information, "they see the pursuit as indicative of the fact that the information has potential impact, and proceed to treat it accordingly."³⁹² In one study, the majority of students considering a protest over campus bookstore prices chose to *settle* with the university even when it was clear that the university would not take disciplinary action against them if they engaged in the protest.³⁹³ However, when it was unclear whether or not the university would take disciplinary action, most students chose to wait until this information was available and, once it was clear that no discipline would ensue, the majority chose to *protest* rather than to settle.³⁹⁴ Thus, waiting for the information imbued it with importance to the decision in a way that altered the decision that would have been made if the same information had been available at the outset.³⁹⁵

An attorney who is aware of this tendency to seek out even irrelevant information can try to counter it in herself and in her clients. In the course of

³⁸⁹ *Id.* See also Eldar Shafir & Amos Tversky, *Thinking Through Uncertainty: Nonconsequential Reasoning and Choice*, 24 COGNITIVE PSYCHOL. 449, 452–59 (1992) (finding similar results in a "Prisoner's Dilemma" game).

³⁹⁰ See, e.g., Amos Tversky & Eldar Shafir, *Choice Under Conflict: The Dynamics of Deferred Decision*, 3 PSYCHOL. SCI. 358, 359–60 (1992).

³⁹¹ Anthony Bastardi & Eldar Shafir, *On the Pursuit and Misuse of Useless Information*, 75 J. PERSONALITY & SOC. PSYCHOL. 19, 28 (1998).

³⁹² *Id.* at 30.

³⁹³ Bastardi & Shafir, *supra* note 384, at 218.

³⁹⁴ *Id.*

³⁹⁵ Bastardi & Shafir, *supra* note 391, at 28 (finding similar results for scenarios involving college applicants, student course choices, mortgage applications, and consumer purchases); see also Donald A. Redelmeier et al., *The Beguiling Pursuit of More Information*, 21 MED. DECISION MAKING 374 (2001).

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an initial interview, both an attorney and client may well feel that they want to gather more information before making a decision such as whether to initiate a lawsuit, whether to initiate settlement conversations, or whether to structure a transaction a certain way. Of course it is often good and appropriate to seek out information. Neither an attorney nor client should necessarily want to make snap judgments. Yet, as the attorney feels the need to seek out information she should at least ask herself: "Is this information really important? If I found out X, what would I do? And if I found out not-X, what would I do?" Perhaps the attorney, having had this internal conversation, will realize that the information she thinks she needs is not important after all. Similarly, knowing that many people have a preference to delay decisions while they gather information that may actually be irrelevant, Jack may want to ask delaying clients similar questions. If the client realizes that the information she thought she wanted would not actually make a difference, the delay may be avoided.

4. *Framing*

Jack might think that people (like computers) would be able to objectively analyze the pros and cons of an option and decide whether that option maximizes their interests. However, it turns out that peoples' evaluations of options are linked to the way the option is described or framed, particularly relative to other options.³⁹⁶ These predictable biases can be important in the context of lawyer-client interviews.

Peoples' willingness to take risks is affected by whether they believe they are facing a potential gain or loss.³⁹⁷ In a body of work known as "prospect theory,"³⁹⁸ Daniel Kahneman and Amos Tversky have shown that people are

³⁹⁶ Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 263 (1979) [hereinafter Kahneman & Tversky, *Prospect Theory*]; Daniel Kahneman & Amos Tversky, *Choices, Values, & Frames*, 39 *AM. PSYCHOL.* 341, 343–44 (1984) [hereinafter Kahneman & Tversky, *Choices*]; Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 453 (1981); see also Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 *S. CAL. L. REV.* 113, 120–28 (1996) (applying insights from psychology of framing to the litigation context).

³⁹⁷ Kahneman & Tversky, *Prospect Theory*, *supra* note 396, at 267; Kahneman & Tversky, *Choices*, *supra* note 396, at 341; Tversky & Kahneman, *supra* note 396, at 453–54.

³⁹⁸ Kahneman & Tversky, *Prospect Theory*, *supra* note 396, at 263; Kahneman & Tversky, *Choices*, *supra* note 396, at 342; Tversky & Kahneman, *supra* note 396, at 454; see also Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 *U.*

risk-averse towards moderate to high probability gains³⁹⁹ and low probability losses,⁴⁰⁰ and risk-seeking towards moderate to high probability losses⁴⁰¹ and low probability gains.⁴⁰² Moreover, people tend to be "loss averse," such that "losses loom larger than gains" and a loss of a given size tends to be more aversive than a gain of comparable size is attractive.⁴⁰³ While one might think that "a gain is a gain and a loss is a loss," it turns out that the characterization of options as gains or losses is highly manipulable.⁴⁰⁴ A number of implications flow from these insights.

First, people may demand more to give up something they already possess than they would be willing to pay to acquire that same item—a phenomenon referred to as the "endowment effect."⁴⁰⁵ For example, in one study half of a group of students were given coffee mugs.⁴⁰⁶ Students with mugs were asked to indicate the price at which they would sell the mug; students without mugs were asked to name the price at which they would buy a mug; trades would then be executed as determined by the responses.⁴⁰⁷ However, few trades were executed because mug owners consistently set

CHI. L. REV. 163, 167–68 (2000) (noting that legal scholars have tended to emphasize the part of Tversky and Kahneman's findings having to do with moderate to high probability risks, but neglected the application of their theory to low probability losses and gains).

³⁹⁹ Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297, 306 (1992). That is, people might not pay \$100 to obtain a 50% chance of winning \$200.

⁴⁰⁰ *Id.* Thus, people tend to be willing to pay a little bit up front to insure against large, but low probability negative risk.

⁴⁰¹ *Id.* That is, people might prefer to take a 25% risk of having to pay a \$1000 fine, than pay \$250 to surely avoid that fine.

⁴⁰² *Id.* We know, from the abundance of lotteries, that people are very willing to spend a few dollars to obtain a very, very low chance of winning a large lottery payout.

⁴⁰³ *Id.*

⁴⁰⁴ See, e.g., Kahneman & Tversky, *Choices*, *supra* note 396, at 343; Korobkin & Guthrie, *supra* note 113, at 1–2.

⁴⁰⁵ See generally Daniel Kahneman, *New Challenges to the Rationality Assumption*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 18 (1994); Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194 (1991); Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1359, 1368 (1995) (demonstrating that pain and suffering awards are higher when framed as the amount necessary to make one suffer the injury *ex ante* than when framed as the amount necessary to make the plaintiff whole *ex post*).

⁴⁰⁶ Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1330 (1990).

⁴⁰⁷ *Id.* at 1330–31.

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selling prices that were higher than the prices set by buyers.⁴⁰⁸

Second, people tend to prefer the status quo over other options because the potential downsides of a change loom larger than the potential gains—a tendency known as the "status quo bias."⁴⁰⁹ Thus, people tend to prefer to stick with their current entitlements and tend to gravitate toward default rules.⁴¹⁰ In one telling example, the states of New Jersey and Pennsylvania both offered two different levels of automobile insurance coverage—one level that had a higher premium and entailed the right to sue and a second level with a lower premium and no right to sue.⁴¹¹ However, the states differed in one important respect—in Pennsylvania the default policy comprised the higher priced, more comprehensive policy with a discount available for those who would waive the right to sue.⁴¹² In New Jersey, the default policy was the lower priced policy, with an option to pay more to obtain the right to sue.⁴¹³ Although the policies in the two states were similar, more drivers in Pennsylvania (75%) opted to purchase the more comprehensive policy than did drivers in New Jersey (20%), with most drivers in each state opting for the default policy.⁴¹⁴

A third implication is that people tend to find a particular option less attractive when considered among other options than when it is considered in isolation—a phenomenon known as option devaluation.⁴¹⁵ When people compare options, they tend to compare the pros and cons of the options. Because losses loom larger than gains, the negative features will assert prominence in this comparison and each option will look less attractive than it would have on its own.⁴¹⁶ Finally, a tendency to avoid losses can incline people to overweigh "sunk costs"—that is, costs that have already been

⁴⁰⁸ *Id.* at 1332.

⁴⁰⁹ See Kahneman et al., *supra* note 405, at 194; Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625 (1998).

⁴¹⁰ Korobkin, *supra* note 409, at 625; Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1159 (2001) (finding increased participation in 401(k) plans when enrollment was the default).

⁴¹¹ Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35, 48 (1993).

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ See Lyle Brenner et al., *Comparison, Grouping, and Preference*, 10 PSYCHOL. SCI. 225, 227 (1999); Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281, 286–87 (1992).

⁴¹⁶ Brenner et al., *supra* note 415, at 225.

incurred.⁴¹⁷ Because such costs are not recoverable, decisions about whether to invest additional resources (e.g., time, money) should not take them into account.⁴¹⁸ Nevertheless, decisionmaking is often influenced by such previous investments.⁴¹⁹ For example, one study found that theater season ticket holders who had paid more for their tickets were more likely to attend the performances than those who had paid less.⁴²⁰

Jack, in discussing options with his clients, may wittingly or unwittingly greatly influence his clients' choices by the way in which he frames those choices. For example, when talking with the Kiddos, Jack might frame the decision to file a lawsuit as a loss—emphasizing the irrevocability of such a filing. This might incline the Kiddos to opt to try negotiations first, so as to avoid the loss of options. Alternatively, Jack could frame such a decision as a gain—emphasizing the possible gains in leverage and momentum. This might incline the Kiddos to file suit. Ideally, Jack can present the Kiddos with both the gain and loss frames and help them grapple with balancing the inevitable risks and benefits.

Jack will also inevitably frame options when he chats with Carl Cementa. As a potential defendant, Carl may be thinking about future losses:

If Henrietta sues me, I will lose the legal fees I will have to pay and I will also lose whatever I have to pay out after a hearing or trial. If I choose to try to settle now, pre-litigation, I will lose whatever amount I pay out and I will lose out in terms of reputation because word will get out that I had to pay off a former client.

On the other hand, Jack could potentially frame an early settlement as a gain, in which case it would likely look much more appealing to Carl. How can an attorney turn a loss into a gain? Just listen:

Carl, I know you feel like you are in a tough situation. One option is a quick, low cost settlement. It may be that if you reach out to Henrietta now, on your own, before any lawsuit is filed, you can resolve this informally. In my experience, some clients just want to hear an apology, and perhaps

⁴¹⁷ See generally Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 124 (1985); Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORGANIZATION 39, 47–50 (1980).

⁴¹⁸ Arkes & Blumer, *supra* note 417, at 124–25, 139 (explaining that sunk costs should not objectively influence decisions).

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 127–29.

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receive some monetary recognition. Perhaps you can give her a call, listen to her explain the problems she has been suffering, and offer her your professional advice. You could explain that you have never had a problem before like she described, that you really think that her water damage problem is due to other factors, but that you would nonetheless be willing to refund her a substantial portion of her original payment. Though you may not feel like paying out \$5,000, this is really peanuts compared to the legal costs and risks of liability you could be facing were she to actually proceed with a lawsuit. It is at least worth considering whether you want to try to save those expenses by making an early settlement.

Carl may still reject the idea of attempting an early settlement, but certainly Jack has increased the likelihood that Carl will choose to try to settle early by framing a potential settlement as a gain rather than a loss.

It should now be clear that attorneys have tremendous power to influence their clients' decisions by framing their clients' decisions in a particular way. Indeed, even if an attorney has a goal of letting clients make their own decisions, it will be virtually impossible for an attorney *not* to influence their clients' decisions by framing the choices in one way or another. So, what is such an attorney to do? The best we can suggest is that the attorney, now more conscious of her power, do her best to describe client options in an evenhanded manner. That is, if an option can be seen as either a loss or a gain, the attorney should use both descriptions.⁴²¹

5. *Affective Forecasting*

Good decisionmaking depends, in part, on the ability to anticipate or predict how we will feel about our choices once we have made them. To what extent will a client, for instance, be more satisfied with settlement X or settlement Y? To what extent will one feel vindicated following a favorable jury verdict? Recent research in psychology has explored how well people perform in predicting their future emotional states.⁴²² This research has

⁴²¹ A choice may also depend on whether the decision task is approached as one in which an option is selected or one in which one or more options are rejected. When acting affirmatively to choose an option, attractive features of the options tend to be salient. In contrast, when deciding which option(s) to reject, the downsides of each option are the focus. Accordingly, an option that has both strong positives (i.e., reasons to choose that option) and strong negatives (i.e., reasons to reject it), may be both more likely to be chosen and more likely to be rejected. See generally Eldar Shafir, *Choosing Versus Rejecting: Why Some Options Are Both Better and Worse Than Others*, 21 MEMORY & COGNITION 546 (1993).

⁴²² See generally Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35

found that people are reasonably accurate in predicting: (1) the valence or direction of their future emotions—that is, at predicting whether something will make them feel good or bad, and (2) the specific emotion they will feel—for example, whether they will feel sadness or anger.⁴²³ On the other hand, however, this research has demonstrated that people are not very good at predicting the intensity or the duration of these anticipated emotions:

In a score of studies, people have been shown to mispredict how they will feel after relocating a household, breaking up with a romantic partner, losing an election, receiving a gift, learning they have a serious illness, failing to secure a promotion, scoring well on an examination, failing to lose weight, reading tragic stories, winning a football game, receiving personality feedback, being insulted, tasting food, and so on.⁴²⁴

Other studies have demonstrated a similar inability to predict the emotions that will follow the denial of tenure,⁴²⁵ the results of a pregnancy test,⁴²⁶ or the death of a spouse.⁴²⁷

There are many reasons why people err in making such predictions. Sometimes people lack experience with the event and do not know what to expect;⁴²⁸ fail to accurately remember their previous emotional reactions;⁴²⁹

ADVANCES EXPERIMENTAL SOC. PSYCHOL. 345 (2003) (reviewing research on affective forecasting); Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOL. 917 (1978). For an examination of some implications of affective forecasting for legal contexts, see Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155 (2005).

⁴²³ Wilson & Gilbert, *supra* note 422, at 347–51.

⁴²⁴ Daniel T. Gilbert & Jane E.J. Ebert, *Decisions and Revisions: The Affective Forecasting of Changeable Outcomes*, 82 J. PERSONALITY & SOC. PSYCHOL. 503, 503 (2002) (citing studies).

⁴²⁵ Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 J. PERSONALITY & SOC. PSYCHOL. 617, 622–24 (1998).

⁴²⁶ Barbara A. Mellers & A. Peter McGraw, *Anticipated Emotions as Guides to Choice*, 10 CURRENT DIRECTIONS PSYCHOL. SCI. 210, 212 (2001).

⁴²⁷ Michael S. Caserta & Dale A. Lund, *Bereavement Stress and Coping Among Older Adults: Expectations Versus the Actual Experience*, 25 OMEGA: J. DEATH & DYING 33, 34 (1992).

⁴²⁸ See Wilson & Gilbert, *supra* note 422, at 354–55 (describing a "misconstrual problem"); see also Julie A. Woodzicka & Marianne LaFrance, *Real Versus Imagined Gender Harassment*, 57 J. SOC. ISSUES 15, 21, 23–24 (2001) (finding that people predict they would feel angry in response to harassment, but that victims report feeling afraid).

⁴²⁹ Wilson & Gilbert, *supra* note 422, at 358–60; see also Daniel Kahneman et al., *When More Pain is Preferred to Less: Adding a Better End*, 4 PSYCHOL. SCI. 401, 404

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or rely on faulty theories about what affects their emotional well-being.⁴³⁰ In addition, people tend to fall prey to "focalism" or a "focusing illusion" in that they focus on a particular aspect of the event in making their prediction and do not take into account the countervailing emotional influences of other aspects of the event or of other life experiences.⁴³¹ Moreover, people may be disposed to an "isolation effect" in which they "disregard components that the alternatives share, and focus on the components that distinguish them."⁴³² Finally, people tend to suffer from "immune neglect" as they underappreciate the ways in which their "psychological immune system" will buffer them from the emotional fallout of future events.⁴³³

Given these phenomena, lawyers may potentially be able to help clients figure out what they really want.⁴³⁴ Although the lawyer cannot literally get inside her client's head, the lawyer does at least have the benefit of having worked with other similarly situated clients in the past.⁴³⁵ Thus, when Edna tells Jack that what she wants more than anything is simply to force the company to defend its action in court, Jack can tell her that other clients thought the same thing but were actually disappointed when the trial ultimately came about. Or, Carl may be a non-confrontational person who

(1993) (finding that recollections of pain were disproportionately influenced by the peak and the end of the experience).

⁴³⁰ See generally Mihaly Csikszentmihalyi, *If We Are So Rich, Why Aren't We Happy?*, 54 AM. PSYCHOL. 821 (1999); Ed Diener & Martin E.P. Seligman, *Beyond Money: Toward an Economy of Well-Being*, 5 PSYCHOL. SCI. PUB. INT. 1 (2004); WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY (Daniel Kahneman et al. eds., 2003); Rebecca K. Ratner & Dale T. Miller, *The Norm of Self-Interest and Its Effects on Social Action*, 81 J. PERSONALITY & SOC. PSYCHOL. 5 (2001).

⁴³¹ See David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 PSYCHOL. SCI. 340, 340 (1998); Timothy D. Wilson et al., *Focalism: A Source of Durability Bias in Affective Forecasting*, 78 J. PERSONALITY & SOC. PSYCHOL. 821, 822 (2000).

⁴³² Kahneman & Tversky, *Prospect Theory*, *supra* note 396, at 271; see generally Elizabeth W. Dunn et al., *Location, Location, Location: The Misprediction of Satisfaction in Housing Lotteries*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1421 (2003).

⁴³³ See Wilson & Gilbert, *supra* note 422, at 381 (arguing that "people fail to appreciate the extent to which they will 'ordinize' positive events by making sense of them [and] fail to appreciate the extent to which they will 'defang' negative events by rationalizing, reconstruing, or minimizing them"); see generally Timothy D. Wilson et al., *Making Sense: The Causes of Emotional Evanescence*, in ECONOMICS AND PSYCHOLOGY 209 (Isabelle Brocas & Juan D. Carrillo eds., 2002).

⁴³⁴ Chris Guthrie & David F. Sally, *Miswanting*, in THE NEGOTIATOR'S FIELDBOOK 277, 279–81 (Andrea K. Schneider & Christopher Honeyman eds., 2006).

⁴³⁵ *Id.* at 280; DANIEL T. GILBERT, STUMBLING ON HAPPINESS 245–51 (2005).

fears that having a face-to-face conversation with an angry Henrietta would be extremely unpleasant. Again, Jack may offer the reassurance that other clients, who felt similarly, ultimately found such a conversation to be productive. While Carl may be correct that face-to-face conversation with Henrietta would not be enjoyable, it may well be less unpleasant than he fears. To the extent the Kiddos are focused on their concern that by settling they will let down their son, Jack can draw their attention to other considerations such as the possibility that continuing to fight a lawsuit and forcing Kyle to keep reliving his bad experience may also be very hard on him. If the Kiddos stop battling the manufacturer in court, they may still be able to work on the issue of magnetic balls through publicity or other efforts.

6. *Decision Regret*

One particular emotion that people anticipate and take into account when making decisions is regret. Regret is "the painful feeling a person experiences upon determining she could have obtained a better outcome if she had decided or behaved differently."⁴³⁶ When making decisions, people anticipate the prospect that they will experience regret following the decision—expecting to experience more regret for negative outcomes when they must choose one option and reject other possibilities;⁴³⁷ when they act than when they fail to act;⁴³⁸ when they miss their goal by a narrow margin or come close to succeeding but do not;⁴³⁹ when they receive feedback about

⁴³⁶ Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 65–66; see generally Graham Loomes & Robert Sugden, *Regret Theory: An Alternative Theory of Rational Choice Under Uncertainty*, 92 ECON J. 805 (1982); David E. Bell, *Regret in Decision Making Under Uncertainty*, 30 OPERATIONS RES. 961 (1982); Ilana Ritov, *Probability of Regret: Anticipation of Uncertainty Resolution in Choice*, 66 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 228 (1996).

⁴³⁷ Guthrie, *supra* note 370, at 635–38.

⁴³⁸ Thomas Gilovich & Victoria H. Medvec, *The Experience of Regret: What, When, and Why*, 102 PSYCHOL. REV. 379, 380–81 (1995).

⁴³⁹ Counterfactual thinking occurs when people make "if only" comparisons of actual outcomes with imagined alternatives. See generally Daniel Kahneman & Dale T. Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYCHOL. REV. 136 (1986); Daniel Kahneman & Amos Tversky, *The Simulation Heuristic*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 201 (Daniel Kahneman et al. eds., 1982); Dale T. Miller et al., *Counterfactual Thinking and Social Perception: Thinking About What Might Have Been*, 23 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 305 (1990).

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what the outcomes of non-chosen options would have been;⁴⁴⁰ or when they have made an atypical choice.⁴⁴¹ Taking into account this anticipated regret, people make decisions that they think will avoid or minimize the amount of regret that they expect to feel.⁴⁴² This inclination to avoid anticipated regret means that people will take into account not only the expected outcome of the decision itself, but also "the feelings associated with the outcomes of foregone options."⁴⁴³

While taking into account the regret that one is likely to experience following a decision is often reasonable, it can sometimes contribute to less optimal decisionmaking. Certainly, "anticipated regret may 'facilitate[] high-quality decisionmaking' by prompting a litigant to engage in 'vigilant appraisal of each course of action' and to construct 'inventive solutions that take account of calculated risks.'"⁴⁴⁴ On the other hand, overweighing or incorrectly assessing anticipated regret may be detrimental to

⁴⁴⁰ See Guthrie, *supra* note 436, at 70; Richard P. Larrick & Terry L. Boles, *Avoiding Regret in Decisions with Feedback: A Negotiation Example*, 63 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 87, 87–88 (1995); see generally Steven J. Humphrey, *Feedback-Conditional Regret Theory and Testing Regret-Aversion in Risky Choice*, 25 J. ECON. PSYCHOL. 839 (2004); Marcel Zeelenberg et al., *Consequences of Regret Aversion: Effects of Expected Feedback on Risky Decision Making*, 65 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 148 (1996). Thus, Guthrie argues that litigants settle, in part, because they "never learn what they would have recovered at trial, but litigants who reject settlement offers in favor of trial learn the outcomes of both options. Settlement, thus, offers litigants an opportunity to avoid, or at least minimize, regret, while trial increases the likelihood litigants will experience regret." Guthrie, *supra* note 436, at 72–73.

⁴⁴¹ See Itamar Simonson, *The Influence of Anticipating Regret and Responsibility on Purchase Decisions*, 19 J. CONSUMER RES. 105, 106 (1992).

⁴⁴² See generally Christopher J. Anderson, *The Psychology of Doing Nothing: Forms of Decision Avoidance Result From Reason and Emotion*, 129 PSYCHOL. BULL. 139 (2003); Bell, *supra* note 436, at 979; Robert A. Josephs et al., *Protecting the Self From the Negative Consequences of Risky Decisions*, 62 J. PERSONALITY & SOC. PSYCHOL. 26 (1992); Alvan R. Feinstein, *The 'Chagrin Factor' and Qualitative Decision Analysis*, 145 ARCHIVES INTERNAL MED. 1257 (1985); Erik Hoelzl & George Loewenstein, *Wearing Out Your Shoes to Prevent Someone Else From Stepping Into Them: Anticipated Regret and Social Takeover in Sequential Decisions*, 98 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 15 (2005); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998).

⁴⁴³ Guthrie, *supra* note 436, at 69.

⁴⁴⁴ *Id.* at 84–85 (quoting IRVING I. JANIS & LEON MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT* 219, 222, 224 (1977)).

decisionmaking, resulting, for example, in a greater willingness to settle below an initially determined reservation price⁴⁴⁵ or causing people to place too high of a premium on the ability to change their minds in instances in which such flexibility is not valuable.⁴⁴⁶ In addition, a person who fears the regret that may flow from taking an action may err too much on the side of doing nothing. Similarly, a person who fears the regret of a near miss may choose a more risky course of action that will either clearly work or clearly fail, but not miss by a little. These choices may not be optimal.

Unfortunately, moreover, people's predictions about their post-decision regret may not always be correct.⁴⁴⁷ In particular, as discussed above, people are not terribly accurate in predicting the intensity and duration of their future emotional reactions.⁴⁴⁸ Indeed, recent studies have shown that people may anticipate feeling more regret than they ultimately experience.⁴⁴⁹ One reason for this may be that decisionmakers tend to evaluate options differently once they have made a decision—changing their evaluations in ways that may help to minimize regret. Psychological research has found that the act of "making a decision can lead to selective memory for information supporting that decision."⁴⁵⁰ Studies have found that for a variety of

⁴⁴⁵ See Larrick & Boles, *supra* note 440, at 93–94 (demonstrating such effects in negotiation). Studies have shown that people lower their reservation price in order to achieve a settlement that will protect them from learning that an alternative course of action would have been better. In effect, they pay a premium to avoid predicted regret. *Id.*

⁴⁴⁶ See Gilbert & Ebert, *supra* note 424, at 511 (finding that "people prefer to have the opportunity to change their outcomes, and believe such opportunities will not influence their experience of those outcomes, but that, in fact, these opportunities inhibit the psychological processes that would otherwise have helped them manufacture satisfaction"). There is a tendency for people to be more satisfied with a decision when they make it and move on to adapting to it than if they retain the option to reverse the decision. *Id.* See also Kin F.E. Wong & Jessica Y.Y. Kwong, *The Role of Anticipated Regret in Escalation of Commitment*, 92 J. APPLIED PSYCHOL. 545, 550–51 (2007) (finding that anticipated regret associated with withdrawal or persistence influences escalation decisions).

⁴⁴⁷ See Daniel T. Gilbert et al., *Looking Forward to Looking Backward: The Misprediction of Regret*, 15 PSYCHOL. SCI. 346, 346 (2004).

⁴⁴⁸ See *supra* Part III.G.5.

⁴⁴⁹ See generally Gilbert et al., *supra* note 447, at 349.

⁴⁵⁰ Mara Mather et al., *Misremembrance of Options Past: Source Monitoring and Choice*, 11 PSYCHOL. SCI. 132, 132 (2000) [hereinafter Mather et al., *Misremembrance*]; see also Jon R. Davidson & Sara B. Kiesler, *Cognitive Behavior Before and After Decisions*, in CONFLICT, DECISION, & DISSONANCE 10, 18–20 (Leon Festinger ed., 1964) (demonstrating post-decisional selective memory for information when choosing between job candidates); Denise Dellarosa & Lyle E. Bourne, Jr., *Decisions and Memory*:

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decisions that people make (e.g., choosing job candidates, roommates, blind dates), people are more likely to attribute positive aspects of the choices to the option they have chosen.⁴⁵¹ In other words, not only are favorable aspects of the chosen option likely to be correctly associated with that option, but favorable aspects of the non-chosen option are likely to be incorrectly associated with the chosen option.⁴⁵² Such post-decision effects on memory can serve to minimize post-decision regret.⁴⁵³ To put it more simply, once we decide something we have a tendency to make ourselves happy with that decision, so that fears of subsequent regret are often overstated.

As with the phenomenon of affective forecasting,⁴⁵⁴ the lawyer who is knowledgeable about regret aversion can try to counsel his clients that they should worry less about regrets and more about anticipated results. Jack might say to Agnes, regarding the drafting of her estate documents:

I know you are worried about making a decision today, because you are afraid you may make a decision that you will later regret. However, at some point you really have no choice but to make a decision regarding how you want to divide your assets. Indeed, if you continue to postpone these decisions you will have effectively made a decision to die intestate, and that would *surely* be a regrettable decision.

If a client appears to be delaying an important decision, such as whether to settle or file a lawsuit, based on a fear of subsequent regret, Jack may want to point out that if the client does settle or file the lawsuit, they will never know how the alternative would have turned out. This observation may give the client some comfort, because anticipated regret is lessened when the outcome of alternatives will not become known.⁴⁵⁵ For example, Jack might

Differential Retrievability of Consistent and Contradictory Evidence, 23 J. VERBAL LEARNING & VERBAL BEHAV. 669, 669 (1984) (demonstrating similar phenomenon for decisions about whether to hospitalize a patient); *see generally* Mara Mather et al., *Remembering Chosen and Assigned Options*, 31 MEMORY & COGNITION 422 (2003) (distinguishing assignments from options chosen).

⁴⁵¹ Mather et al., *Misremembrance*, *supra* note 450, at 135–36.

⁴⁵² *Id.* at 136. Correspondingly, people also sometimes associate negative features of the options with the non-chosen option. *Id.*

⁴⁵³ *See* Armor & Taylor, *supra* note 116, at 343–45 (discussing optimistic reinterpretation); Jack W. Brehm, *Post-Decision Changes in the Desirability of Alternatives*, 52 J. ABNORMAL & SOC. PSYCHOL. 384 (1956); *see also* Thomas R. Shultz et al., *Free Choice and Cognitive Dissonance Revisited: Choosing "Lesser Evils" Versus "Greater Goods"*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 40 (1999).

⁴⁵⁴ *See supra* Part III.H.5.

⁴⁵⁵ Larrick & Boles, *supra* note 440, at 94.

say to Edna:

I have had clients in the past refuse to settle cases early because they were afraid they would later hear that a similarly situated person got a better deal. Yet, I have not once actually had a client come to me to report hearing of such a better settlement by a similarly situated person. The reality is that each dispute is typically so unique that the odds of learning of a similarly situated person's settlement are pretty remote.

Or,

It is natural to want your day in court. In the past, I have often taken clients' claims to court because the client told me they would always regret it if they did not see whether they could win in court. But, even when I won many of those clients' cases, an awful lot of those clients told me that going to court did not give them the satisfaction they were seeking. In the end, clients often find the trial to be disappointing, because even in court we cannot force people to tell the truth or to tell the whole story.

Of course, Jack does not want to push his clients too hard to make decisions before they are ready. If he does push them hard, and if they do make decisions that they later regret, they could even take out their regret on Jack by firing him, failing to send him referrals, or suing him for malpractice.

IV. RECAPPING THE RELEVANCE OF PSYCHOLOGICAL INSIGHTS TO SPECIFIC STAGES OF INTERVIEWING AND COUNSELING

It is clear that psychology provides many useful insights for attorneys' interviewing and counseling practice. This part will recap some of the highlights, following the order of a typical interviewing and counseling session.

A. Preparing for the Interview

1. Pre-Interview Information

Before they commence their initial interview with a client, some lawyers chat with the client by phone, ask the client to fill out a written survey or other document, or have a paralegal do a screening interview. From a psychological standpoint, brief preliminary phone conversations can

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potentially be helpful in beginning to establish a relationship and build rapport.⁴⁵⁶ Conversely, the use of surveys or screening interviews with paralegals may give the impression that the attorney does not care enough about the client to participate in a conversation,⁴⁵⁷ and may lead the attorney to pre-determine what kinds of issues are important.⁴⁵⁸ In-person interviews offer a better opportunity than phone conversations or certainly written surveys to impress the client, build rapport, learn from the client, minimize reliance on the attorney's prior conceptions, and assess the client's own credibility.⁴⁵⁹ If an attorney feels it is important to get a "heads up" on the subjects to be discussed, we suggest a brief and friendly phone call to probe the generalities of the problem.

2. *Setting the Stage*

Whereas Jack has expressed little or no interest in the setup of his interview room or his appearance, psychologists have found that these things can be important.⁴⁶⁰ Ensuring clients' comfort is not just a matter of good manners, but also important to help build rapport. The client who feels good rapport with her attorney will be more forthcoming, and also more likely to fully hear the counsel offered by the attorney.⁴⁶¹ Thus, Jack should pick an interview setting likely to ensure privacy and to build both rapport and confidence. If an attorney keeps a neat and comfortable office with diplomas or other awards on the wall, the intimate office setting can be appropriate. Alternatively, attorneys who have messy or otherwise unimpressive offices may want to conduct interviews in a nice conference room. In either setting, the attorney may want to offer the client a choice of seating options, and ensure that physical distance is sufficient for the client to feel comfortable.

Similarly, although Jack wants to believe that his brain, not his appearance, is relevant to his clients, psychological research shows that peoples' appearance plays an important role in how they are perceived.⁴⁶² Perhaps Jack's longtime clients will not care if he dresses down, but with new clients Jack must be careful to create a good first impression that builds

⁴⁵⁶ See *supra* Part III.E.4.

⁴⁵⁷ See *id.*

⁴⁵⁸ See *id.*

⁴⁵⁹ See *supra* Part III.A.

⁴⁶⁰ See *supra* Part III.E.6.

⁴⁶¹ See *supra* Part III.E.4.

⁴⁶² See note 74 and accompanying text.

confidence and generates comfort.⁴⁶³ To some degree his style of dress and grooming may depend on his clientele. Lawyers who work as sports agents or who represent entertainers may well want to dress more flamboyantly than lawyers who do estate planning for elderly widows in the Midwest. So, while we cannot prescribe a particular set of clothes or hairstyle that is best for all situations, we can say that appearances do matter.⁴⁶⁴

B. *Conducting the Interview*

1. *Importance of Open-Ended Questions*

Once Jack commences the interview, it will be important for him to use open-ended questions. Such questions are useful, from a psychological standpoint, for a variety of reasons. First, they allow clients to tell the story in the order that makes sense to them.⁴⁶⁵ This will encourage clients to tell a more complete story,⁴⁶⁶ aid clients' recall,⁴⁶⁷ allow clients to provide a level of detail with which they are confident,⁴⁶⁸ allow clients to explain their non-legal concerns,⁴⁶⁹ and deter attorneys from putting their clients' stories into pre-existing schema.⁴⁷⁰ Allowing clients to speak fully in response to open-ended questions will also speak to clients' desire for procedural justice.⁴⁷¹ Whereas Jack has previously prided himself on his short interviews,⁴⁷² cutting off clients' answers is a false efficiency that will prevent Jack from

⁴⁶³ See generally Milford, *supra* note 300 (explaining that what an attorney wears makes a difference and giving suggestions on appropriate attire).

⁴⁶⁴ Positive affect or mood may also affect lawyers' effectiveness. For example, there is evidence that positive emotions broaden one's attentional focus and increase creative thinking. See generally Barbara L. Fredrickson, *What Good Are Positive Emotions?*, 2 REV. GEN. PSYCHOL. 300 (1998); Clark Freshman et al., *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1, 31; Alice M. Isen, *Positive Affect and Decision Making*, in HANDBOOK OF EMOTION 417 (Michael Lewis & Jeannette Haviland-Jones eds., 2000).

⁴⁶⁵ See *supra* Part III.C.2.

⁴⁶⁶ See *id.*

⁴⁶⁷ See *id.*

⁴⁶⁸ See *id.*

⁴⁶⁹ See *supra* Part III.B.1.

⁴⁷⁰ See *supra* Part III.B.3.

⁴⁷¹ See *supra* Part III.G.2.

⁴⁷² See *supra* Part II.

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either gathering full information or establishing client rapport.⁴⁷³

Of course Jack will want to go back and ask his clients to fill in some details, and he may well need to ask pointed questions to cover issues not discussed by the clients in responding to open-ended questions. However, Jack should guard against interrupting clients. Such interruptions may well cause clients to provide more limited information or to forget key details⁴⁷⁴ and is unlikely to make them feel respected.⁴⁷⁵

2. Cultural Sensitivity and Avoidance of Stereotypes

As Jack questions his clients he must be careful to avoid stereotypes. The mere fact that his client is dressed like a slob does not mean, for example, that his client is poor. Rather than make assumptions based on clients' appearance, race, ethnicity, gender, or other factors, Jack should use his questions to allow his clients to tell their own stories.⁴⁷⁶ At the same time, Jack should be attuned to the possibility that his clients' culture may lead them to have different preferences than might be natural to Jack. Some clients may, for example, be uncomfortable with the handshake, use of first names, and straight gaze that Jack has said he uses with all clients.⁴⁷⁷

3. Listening Effectively and Responding Encouragingly

In addition to asking appropriate questions of his clients, Jack should also draw on his new psychological knowledge to listen and respond appropriately. Most people probably think they are fairly good listeners, but in fact many of us do not listen as effectively as we might. Jack may well be guilty of multi-tasking—letting his mind wander to other tasks while his clients describe their problems. Or, Jack may allow himself to be guided unduly by stereotypes and heuristics, placing his clients' problems into pre-determined categories.⁴⁷⁸ To battle these likely flaws Jack needs to try to focus more attentively on his clients, and such effective listening includes not only hearing clients' words but also paying attention to their tone and body language.⁴⁷⁹

⁴⁷³ See *supra* Part III.E.4.

⁴⁷⁴ See *supra* Part III.C.2.

⁴⁷⁵ See *supra* Part III.G.2.

⁴⁷⁶ See *supra* Part III.F.

⁴⁷⁷ See *supra* note 22 and accompanying text.

⁴⁷⁸ See *supra* Parts III.A.2, III.B.

⁴⁷⁹ Some suggest that the practice of mindfulness meditation is a good way for

Moreover, the old Jack viewed himself as a law professor, seeking to extract facts as quickly and efficiently as possible. Law professors are not seen as kind and gentle in their employment of the "Socratic method."⁴⁸⁰ But, psychological studies have shown that interviewers can both obtain more information and also create better rapport by engaging in an effective and sympathetic back and forth with their clients.⁴⁸¹ Similarly, Jack must develop some comfort with interacting with his clients at an emotional level. If Jack attempts to completely avoid emotion, he will be unable to understand his clients' non-legal concerns, unable to build a solid rapport with his client, unable to encourage his client to provide all information pertinent to the legal issue, and unable to connect well to his client as a counselor.⁴⁸²

4. *Helping Clients Remember*

Jack knows that his clients' memories are far from perfect. However, he now understands the ways in which human memories differ from computers.⁴⁸³ He also has at his disposal a number of helpful tools derived from the psychological literature that he can use to try to effectively trigger client memories. For example, he can use open-ended questions,⁴⁸⁴ ask his clients to retell their story in chronological or reverse chronological order; ask them to focus on details of the setting that may not be directly relevant to the legal problem; and try to get clients to focus more on facts.⁴⁸⁵ He also knows from the psychological literature that he will not have much success if he simply urges his clients to probe their memories better for all of the facts⁴⁸⁶ and understands that frequent interruptions can interfere with client memories.⁴⁸⁷

attorneys to become more aware of their own and others' words and body language. See Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 3–8 (2002).

⁴⁸⁰ See generally Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); SCOTT TUROW, *ONE L* (1977); *THE PAPER CHASE* (Twentieth Century Fox 1973).

⁴⁸¹ See *supra* Parts III.C.2, III.E.4.

⁴⁸² See *supra* Part III.E.3.

⁴⁸³ See *supra* notes 216–40 and accompanying text.

⁴⁸⁴ See *supra* Part III.C.2.

⁴⁸⁵ See *id.*

⁴⁸⁶ See Fisher, *supra* note 147, at 734.

⁴⁸⁷ See *supra* note 158 and accompanying text.

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5. *Building Trust*

The old Jack would never have focused much on the importance of building trust. He would have assumed that the client would trust him based on his obvious intellect. And, if the client did not trust him, that was the client's loss. But, the psychology literature shows that Jack ought to care about creating trust because he will more readily obtain full information from a trusting client.⁴⁸⁸ Similarly, Jack will be more effective as a counselor when his clients trust him.⁴⁸⁹ To gain his clients' trust, Jack should not only continue to show clients that he is a competent and intelligent attorney, but also show clients that he cares about them as people and that he is willing to set aside his own personal interests, when necessary. Studies have shown that open communication, perspective taking, and willingness to explain can all be important to building a trusting relationship.

6. *Being Aware of Clients' and One's Own Likely Cognitive Biases*

We have discussed a broad array of cognitive biases that affect typical clients and typical attorneys.⁴⁹⁰ Both lawyers and clients tend to perceive the world through their schema and stereotypes,⁴⁹¹ emphasize personal characteristics when they attribute causation,⁴⁹² assume that others see the world the same way they do,⁴⁹³ are affected by an array of positive illusions,⁴⁹⁴ and show a tendency to do Monday morning quarterbacking.⁴⁹⁵ As clients report the "facts" as they understand them to their attorneys,⁴⁹⁶ the attorneys need to consider that their clients' discussions of these "facts" are undoubtedly affected by the psychology of cognition. Attorneys need to ask follow up questions and seek alternative perspectives to try to get beyond these biases. Similarly, attorneys need to be aware of the use of such heuristics in their own thinking.

⁴⁸⁸ See *supra* Part III.E.4.

⁴⁸⁹ See *id.*

⁴⁹⁰ See *supra* Part III.

⁴⁹¹ See *supra* Part III.A.2.

⁴⁹² See *supra* Part III.A.3.

⁴⁹³ See *supra* Part III.A.4.

⁴⁹⁴ See *supra* Part III.B.3.

⁴⁹⁵ See *supra* Part III.B.4.

⁴⁹⁶ See *supra* Part III.A.1.

7. *Verifying Veracity*

Jack worries, probably rightly, that some of his clients may lie to him. However, whereas Jack used to have great confidence in his own abilities to sniff out the liars, he now understands that very few of us are in fact able to accurately detect lying.⁴⁹⁷ Thus, Jack will be better off keeping an open mind and withholding judgment about veracity while seeking confirmation from other witnesses or documents.⁴⁹⁸ Jack also needs to remember that witnesses often report the same incident quite differently based on their different perceptions, construal, and memories, even though neither witness is lying.⁴⁹⁹

8. *Remembering the Interview*

As we have discussed, Jack's own memory is no more infallible than that of his clients. Jack must take steps to ensure that he adequately recalls and records his discussions with his own clients, as absent special measures, surely his memory will fail.⁵⁰⁰

C. *Analysis*

Jack is very confident of his analytical abilities and indeed has the good LSAT scores and grades to support his confidence. Yet, it is likely that Jack, like the rest of us, commonly falls into some analytical traps. He should particularly try to guard against the following: being overly optimistic regarding his own skills and regarding clients' prospects for success;⁵⁰¹ allowing the framing of a particular decision as either a gain or loss to affect his evaluation;⁵⁰² overestimating the likelihood of a particular event based on the apparently high "availability" of that event;⁵⁰³ following a tendency to potentially throw good money after bad;⁵⁰⁴ or stereotyping his clients or

⁴⁹⁷ See *supra* Part III.D.

⁴⁹⁸ See *id.*

⁴⁹⁹ See *supra* Parts III.A, III.C.4.

⁵⁰⁰ See *supra* Part III.C.4.

⁵⁰¹ See *supra* Part III.B.3.

⁵⁰² See *supra* Part III.H.4.

⁵⁰³ See *supra* Part III.B.1.

⁵⁰⁴ See *supra* Part III.H.4.

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other persons his clients might discuss in the interview.⁵⁰⁵

D. Providing Advice

Providing advice to clients, or for that matter to anyone, can be tricky.⁵⁰⁶ No matter whether Jack seeks to be directive or client-centered in his approach, he will need to overcome a variety of psychological hurdles to be effective as a counselor. First, Jack needs to avoid the tendency to focus exclusively on purely legal and monetary matters.

As Jack helps his clients think through their options, he needs to remember that many clients will have a craving for justice—procedural, distributive, and retributive.⁵⁰⁷ To some degree, Jack can fulfill his clients' desire for procedural justice through the ways in which he interviews them.⁵⁰⁸ But, as Jack counsels clients about their options, he should recall that his clients may have a strong interest in having their voice heard or in presenting their claims to a neutral, and not just in receiving a particular substantive outcome.⁵⁰⁹ Of course Jack should also consider his clients' desire for distributive justice, while recognizing that this may mean something more than just getting the most one can for oneself.⁵¹⁰ In addition, clients may have needs based on their sense of retributive justice—such as a need to punish or to receive an apology. So, as Jack asks his clients to consider whether it makes sense to try to litigate and to think about potential settlement strategies, he should describe those options in a way that allows clients to consider whether such outcomes would be "just."

Dealing with clients' cognitive biases is also challenging. Given clients' tendency to be overoptimistic,⁵¹¹ attorneys need to make a special effort to explain potential risks and downsides clearly, and to try to make sure that clients are not just hearing the positive and tuning out the negative.⁵¹² At the

⁵⁰⁵ See *supra* Part III.A.2.

⁵⁰⁶ As every parent and every child know, receivers of advice sometimes do the opposite of what was recommended. See generally JACK W. BREHM, *A THEORY OF PSYCHOLOGICAL REACTANCE* (1966).

⁵⁰⁷ See *supra* Part III.G.

⁵⁰⁸ See *supra* Part III.G.2.

⁵⁰⁹ See *id.*

⁵¹⁰ See *supra* Part III.G.1.

⁵¹¹ See *supra* Part III.B.3.

⁵¹² While some law students or inexperienced attorneys may believe that it would be desirable to leave clients with their rosy glasses view of the world, failing to advise clients properly of the risks that they face will often lead to very unpleasant consequences

same time, an attorney who beats her client over the head with negative risks may well have a difficult time establishing a good rapport.⁵¹³ Clients look to their attorneys to be their advocates, and may feel that an attorney who spends too much time warning of downsides is not an effective advocate.⁵¹⁴ Walking this fine line between optimism and pessimism is tricky, and no single strategy will work for all clients. The attorney needs to try to communicate risks while at the same time maintaining her role as a strong advocate for the client. For example:

I will do my best to win this claim for you, and I have had some good successes in the past. However, no attorney is always successful and this claim has some real risks. For example, [provide details pertinent to legal risks of possible lawsuit as well as financial, reputational, or other costs]. You need to carefully think through whether, for you, the possible benefits of bringing this claim outweigh the very real risks.

The attorney can also try to maintain her good relationship with the client, albeit while giving bad news, by making it clear that the legal risks the client faces do not necessarily reflect the moral value of the claim or the attorney's personal view of whether or not the client was wronged. In chatting with Edna Employee, Jack might explain:

Ms. Employee, I have heard your account of the way you were treated at work. As you explain things it certainly sounds like you were treated very unfairly. It seems that you have endured a very difficult set of events and I certainly understand why you are very hurt and angry. I understand why you would like to bring a lawsuit in order to prove that you were wronged and prevent others from being similarly mistreated. Unfortunately, I have to tell you that from a purely legal perspective, there are some real potential weaknesses to your claim. First, in our jurisdiction, employment is called "at-will." That means that, in general, an employer can fire an employee for a good reason, a bad reason, or no reason whatsoever, so long as that reason was not discrimination on the basis of something like race, gender, or age. Now I know that you believe that you were in fact discriminated against,

later in the attorney-client relationship. Of course, failing to properly advise clients of the full nature of their situation can also be unethical. See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002) (requiring, *inter alia*, that an attorney "keep the client reasonably informed about the status of the matter," and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

⁵¹³ See *supra* Part III.E.4.

⁵¹⁴ See, e.g., Felstiner & Sarat, *supra* note 254, at 1455-56 (noting that clients are concerned about lawyers' commitment to their case).

INSIGHTS FOR INTERVIEWING AND COUNSELING CLIENTS

but our challenge will be how to prove that in a court of law. We will need to present your case using the witnesses and documents we can find. The reality is that some of those witnesses may not tell the truth, because they will be afraid of losing their own jobs. And, even if helpful documents exist, they are in the company's files and realistically may not be accessible to us. So, we have to assess the positives and negatives of bringing a claim in light of these factors. I am certainly not saying you should not bring a lawsuit. Indeed, I am more than ready to represent you, should you decide to make that choice. But, I want you to think through the likely benefits and risks carefully and make the decision you think will be best for you.

The psychologically attuned attorney will need to try to assess her client's individual needs, and will recognize that advice that might be too negative for one client will be appropriate for another. Also, the attorney must listen carefully to the client to discern whether she has or has not heard the downsides previously stated by the attorney. Once the client has processed the negative information, repeating it may not be necessary and may just harm the rapport between the attorney and client. But, if the client has apparently failed to hear the risks, the attorney may need to restate them in a way that the client can more fully understand.⁵¹⁵

The attorney also needs to be careful in the way that she frames a client's options. We have seen that the attractiveness of a particular option varies substantially depending upon the way it is presented.⁵¹⁶ Grouping one option with certain others may lessen or heighten its attractiveness.⁵¹⁷ Characterizing an option as a gain rather than a loss relative to the status quo will make that option more attractive.⁵¹⁸ Similarly, the attorney needs to be careful about providing early assessments or other information that may tend to "anchor" clients' perceptions or expectations.⁵¹⁹ So, what is the conscientious, psychologically aware attorney to do? One temptation may be to take a vow of silence, in that astute attorneys will realize that they cannot help but influence their clients every time they open their mouths. Yet, silence is not an option because the attorney has been hired to provide good counsel. Thus, our best advice is that the attorney be conscious of the significance of the terms she uses, and try to vary her advice accordingly. To avoid undue anchoring, for example, the attorney can be somewhat cautious as she makes predictions, particularly early in the representation. Where

⁵¹⁵ See *supra* Part III.E.5.

⁵¹⁶ See *supra* Part III.H.4.

⁵¹⁷ See *id.*

⁵¹⁸ See *id.*

⁵¹⁹ See *supra* Part III.B.2.

options can be presented as either gains or losses, the attorney could present them in both lights.

As clients respond to the advice afforded by their attorneys, psychologically educated attorneys can be prepared to address common phenomena that may affect the client's decisions: a tendency to gather irrelevant information,⁵²⁰ difficulty predicting future emotional reactions generally,⁵²¹ and a tendency to make decisions based on regret aversion.⁵²² The psychologically attuned attorney can try to counter all of these phenomena by addressing them head on.⁵²³

Counseling clients involves, in part, acting as a teacher. Thus, the vast psychological literature on learning theory is highly relevant to attorneys. That literature shows that people learn in different ways, and that effective teachers use multiple methods to convey their messages.⁵²⁴ Thus, whereas the typical attorney may rely substantially on oral communication with the client, the psychologically attuned attorney will know to use different approaches as well. Good teachers also know that important lessons often need to be repeated, so attorneys should not assume that their clients heard and retained everything that was said at a prior session.

V. CONCLUSION

It has been said that "neither LAW nor HUMAN NATURE is an exact science,"⁵²⁵ and surely many lawyers would agree. Nonetheless, the science of psychology has much to contribute to the art of legal practice and to the craft of interviewing and counseling clients. While we cannot provide an exact recipe for success, we hope that by reminding lawyers of the importance of psychological science and by highlighting some critical insights offered by that field, we have provided the tools to improve their representation of clients.

⁵²⁰ See *supra* Part III.H.3.

⁵²¹ See *supra* Part III.H.5.

⁵²² See *supra* Part III.H.6.

⁵²³ See *supra* Part III.H.3.

⁵²⁴ See *supra* Part III.E.5.

⁵²⁵ HARRIS'S HINTS ON ADVOCACY 316 (George W. Keeton ed., 14th ed. 1911).